144-211

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 1330.

ALBERT H. GLASPELL, PLAINTIFF IN ERROR,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

FILED AUGUST 13, 1891.

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1 ALBERT H. GLASPELL
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY.

Pleas before the Honorable Alfred D. Thomas, judge of the district court of the United States for the district of North Dakota, sitting in the circuit court for said district, at the term of May, A. D. 1891.

Be it remembered that on the 26th day of March, 1890, the Northern Pacific Railroad Company applied to this court for an alternative writ of certiorari, directed to the judge of the district court of the 5th judicial district within and for Stutsman county, North Dakota, presenting upon such application the affidavit of John S. Watson, together with copies of the petition and bond for removal of the cause to the circuit court of the United States, duly certified by the clerk of said district court; which said affidavit and copies of petition and bond are in words and figures following, to wit:

UNITED STATES OF AMERICA:

In the United States Circuit Court for the District of North Dakota.

ALBERT H. GLASPELL, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

STATE OF NORTH DAKOTA,
Stutsman County.

J. S. Watson, being duly sworn, says he is attorney for the defendant, Northern Pacific Railroad Company, in the above-entitled action; that he has read the petition praying for a transfer of said cause to the circuit court of the United States for the district of North Dakota, of which the annexed is a true copy, and knows the contents of said petition, and that the same is true of his own knowledge excepting as to the matters therein stated upon information and belief, and as to such matters he believes it to be true; that after the admission into the Union of the State of North Dakota, and prior to the filing of said petition in the office of the clerk of the district court for Stutsman county, your petitioner did not in any manner invoke the aid or action of the State court in said cause; that during the period aforesaid the State court did not make any orders or exercise any act of jurisdiction in said cause, save that all the papers, files, and proceedings and records therein remained and now remain in the care and custody of the clerk of said court for Stutsman county as the successor in office of the clerk of the territorial district court wherein said action originated, was tried, and was pending at the date of the admission of the State of North
2 Dakota into the Union; that subsequent to the filing of said petition affiant duly tendered to the clerk of said court his

legal fees for such service and demanded that he transmit to the clerk of the United States circuit court for the district of North Dakota all the files, records, and proceedings in said cause; that said clerk thereupon refused and still refuses to so transmit said files, records, and proceedings, and assigns as his sole reason for such refusal that the judge of the district court for said Stutsman county had forbidden him (the clerk) to comply with such request.

Wherefore he prays that a proper writ may issue from this court, directed to the district court for Stutsman county, North Dakota, and the Hon. Roderick Rose, judge of said court, directing and requiring that all the records, files, and proceedings in said court in said action be forthwith transmitted to this court; and your petitioner will ever pray.

JNO. S. WATSON.

Subscribed and sworn to before me this March 25th, 1890.

[SEAL.] O. H. HEWIT,
Notary Public.

STATE OF NORTH DAKOTA, }
Stutsman County. }

In District Court, Fifth Judicial District.

ALBERT H. GLASPELL, Plaintiff,
vs.
NORTHERN PACIFI- RAILROAD COMPANY, Defendant.

To the honorable court aforesaid:

The petition of The Northern Pacific Railroad Company, the defendant in the above-entitled action, respectfully shows that said defendant is a corporation, not banking, duly organized, created, and existing under and by virtue of that certain act of Congress of the United States approved July 2d, 1864, entitled "An act granting lands to aid in the constructing of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route, and those certain subsequent acts and joint resolutions of Congress relating to the same subject-matter; that by virtue of said acts and joint resolutions of Congress said defendant has constructed and now owns, maintains, and operates a line of railroad and telegraph extending westwardly from Lake Superior to Puget sound; that the above-entitled action has been commenced and is now pending in this court; that the date of the commencement of said action was on or about February 24th,
3 1885; that the same was tried at the November, 1888, term of the district court of said county of Stutsman, and a verdict rendered by the jury in favor of the plaintiff and against the defendant; that on November 26th, 1888, judgment was rendered in said action in favor of the plaintiff for the sum of twelve thousand six hundred nine and $\frac{58}{100}$ ($12,609.58) dollars. Thereafter, and within the time allowed by law for that purpose, defendant prepared and caused to be settled a bill of exceptions in said cause; said bill of exceptions was settled and allowed on August 30th, 1889, and

was filed in the office of the clerk of said court on September 3, 1889. On the date last above named defendant served upon plaintiff notice of its intention to move for a new trial, and designated September 12, 1889, as the date upon which said motion would be presented; that upon September 12th, 1889, the judge of said court continued the hearing of said motion until September 21st, 1889; said motion has not been decided, but is now pending before said court; that said action is now pending in said court and has not been finally determined upon appeal; that the time for appeal has not yet passed, and the judgment entered therein has not been satisfied; that the amount in controversy in said action exceeds the sum of two thousand ($2,000.00) dollars, exclusive of costs and interest; that the sum so involved is the sum of fourteen thousand dollars, as will more fully appear by reference to the complaint herein; that by reason of the premises said action is an action arising under the laws of the United States, and, furthermore, your petitioner has a defense thereto arising under the laws of the United States; that said action arose and was commenced in the Territory of Dakota and within the limits of that portion of said Territory which has since become one of the States of the United States, having been admitted into the Union since the commencement of said action as the State of North Dakota; that said action was pending in the district court of Stutsman county at the time of the admission of said State of North Dakota into the Union; that said action is a suit of which the circuit court of the United States for the district of North Dakota might have had jurisdiction under the laws of the United States had such circuit court of the United States for the district of North Dakota been in existence at the time of the commencement of said action, and that by reason of the premises the petitioner is entitled under the acts of Congress for such cases made and provided, and more particularly
4 under that certain act of Congress approved February 22, 1889, entitled "An act to provide for the division of Dakota into two States, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments, and to be admitted into the Union on an equal footing with the original States," to remove said action into the circuit court of the United States for the district of North Dakota for the proceedings therein, and to that end herewith tenders to this court proper and sufficient surety for the doing by it of the several things required by the said acts to be done upon the removal or transfer of a cause into a United States court.

Wherefore your petitioner prays that the said surety may be accepted, and that this court proceed no further in said cause, and that the same may be transmitted to the circuit court of the United States for the district of North Dakota for further proceedings therein.

Dated December 7th, 1889.

JNO. S. WATSON,
Attorney for the Petitioner.

Upon the back of said petition appear endorsements in words and figures following, to wit:

Filed in the office of the clerk of district court for Stutsman county, N. Dak., this December 7th, 1889. T. F. Branch, clerk.

STATE OF NORTH DAKOTA, }
Stutsman County. }

In District Court, Fifth Judicial District.

ALBERT H. GLASPELL, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Bond of Removal to the United States Court.

Know all men by these presents that we, E. P. Wells and George L. Webster, sureties of the Northern Pacific Railroad Company, are held and firmly bound unto Albert H. Glaspell in the above-entitled suit in the penal sum of five hundred ($500) dollars, lawful money of the United States; for the payment of which, well and truly to be made, we hereby bind ourselves and our executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this December 7th, 1889.

Whereas the Northern Pacific Railroad Company has filed its petition in the court aforesaid, praying for the removal into the circuit court of the United States for the district of North Da-
5 kota of the above-entitled suit under and by virtue of the acts of Congress for such cases made and provided:

Now, therefore, if the said Northern Pacific Railroad Co. shall enter in the circuit court of the United States for the district of North Dakota, on the first day of its session hereafter, a copy of the record in said suit and shall pay all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongly and improperly removed thereto, *and* in such case the above application to — void, but otherwise to remain of full force and effect.

(Signed) E. P. WELLS.
GEORGE L. WEBSTER.

STATE OF NORTH DAKOTA, }
Stutsman County, }

Personally came before the undersigned E. P. Wells and George L. Webster, the same persons who executed the foregoing instrument, and acknowledged they executed the same freely and voluntarily; and each of said persons being by me duly sworn, he deposes and says that he is a resident and freeholder of this State and worth the sum of one thousand dollars ($1,000.00) above his debts, liabilities, and property exempt from levy and sale under execution.

E. P. WELLS.
GEORGE L. WEBSTER.

Subscribed and sworn to before me this day of December 7th, 1889.

[SEAL.] GEO. WILLEY,
Notary Public.

Filed in the office of the clerk of the district court for Stutsman county, North Dakota, this 7th day of December, 1889.

T. F. BRANCH, *Clerk.*

I, T. F. Branch, clerk of the district within and for Stutsman county, State of North Dakota, do hereby certify that I have carefully examined and compared the annexed and foregoing papers with the originals, and that they are true and exact copies of the petition for transfer of said case to the United States circuit court for the district of North Dakota, and the undertaking therefor, in the case of Albert H. Glaspell, plaintiff, *versus* The Northern Pacific Railroad Company, as the same now remain of record in my office; that I have refused and now refuse to transmit the files, records, and proceedings in said cause to the United States circuit court for the district of North Dakota for the sole reason the judge of the said district court for Stutsman county has forbidden me so to do; that the attorney for petitioner has duly tendered me my lawful fees for such transmittal.

Witness my hand and official seal this March 14th, 1890.

[SEAL.] T. F. BRANCH,
Clerk of District Court, Stutsman County, N. D.

6 Thereupon, afterwards, to wit, on the 26th day of March, 1890, an order was made in said cause allowing said alternative writ of certiorari; which order is in words and figures following, to wit:

To the clerk of the circuit court:

Let the within alternative writ of certiorari issue.

Dated Mar. 26, 1890.

A. D. THOMAS,
U. S. District Judge for the District of North Dakota.

Thereupon, afterwards, to wit, on the 31st day of March, 1890, said alternative writ of certiorari was issued in said case; which said writ is in words and figures following, to wit:

The President of the United States of America to the judge of the district court of the fifth judicial district within and for Stutsman county, North Dakota:

Whereas it hath been represented to the circuit court of the United States for the district of North Dakota that a certain suit was commenced in the district court of the sixth judicial district within and for the said county of Stutsman, in the Territory of Dakota, on or about February 24th, 1885, wherein A. H. Glaspell was plaintiff and The Northern Pacific Railroad Company defendant.

That said defendant is a corporation, not banking, created and existing under and by virtue of that certain act of Congress of the United States approved July 2d, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and by virtue of those certain subsequent acts and joint resolutions relating to the same subject-matter.

That said suit was an action arising under the laws of the United States, and that defendant has a defense thereto arising under the laws of the United States.

That said action arose and was commenced in that portion of the Territory of Dakota which has since become one of the States of the Union, having been admitted into the Union since the commencement of said action as the State of North Dakota; that the amount involved in said action is more than two thousand ($2,000.00) dollars, exclusive of interest and costs, and is, to wit, fourteen thousand ($14,000) dollars.

That said action was pending in the district court for said Stutsman county at the time of the admission of the State of North Dakota into the Union; that said action is a suit of which the circuit court of the United States for the district of north
7 Dakota might have had jurisdiction under the laws of the United States had such circuit court of the United States for the district of North Dakota been in existence at the time of the commencement of said action.

And that the defendant duly filed in the district court for Stutsman county, on December 7th, 1889, its request for the transfer and removal of said cause into the said circuit court of the United States under and by virtue of the act of Congress approved February 22, 1889, entitled "An act to provide for the division of Dakota into two States, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments, and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to said States," and also filed a sufficient bond, with surety, upon such transfer or removal, and that the clerk of the district court for said Stutsman county, being the clerk of the court above named, has refused to transfer to the circuit court of the United States for the district of North Dakota the files, records, and proceedings relative to said case, though his legal fees therefore were tendered by said petitioner.

You, therefore, are hereby commanded that you forthwith transfer or cause to be transferred to the circuit court of the United States for the district of North Dakota all the files, records, and proceedings in the said cause in which the said petition for removal was filed, as aforesaid, in as full and ample a manner as the same now remains before you, together with this writ, so that the said circuit court may be able to proceed thereon and do what shall appear to them of right ought to be done, or show cause why you have not do- so before the circuit court of the U. S. for the dist. of North

Dakota at the opening of said court, at Bismarck, N. D., on the 1st Tuesday of April, 1890, or — soon ther-after as counsel can be heard.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, and the seal of said circuit court, hereto affixed this 31 day of March, 1890.

WM. BOOTH, JR.,
Clerk of said Circuit Court.

Upon said writ appears admission of service in words and figures following, to wit:

JAMESTOWN, N. DAKOTA, *April 3rd*, 1890.

8 Service of the above and foregoing writ was served on me this 3rd day of April, 1890, by John S. Watson, Esq., at Jamestown, N. Dakota.

RODERICK ROSE,
Judge of the District Court of the 5th Judicial District for Stutsman County, North Dakota.

Upon the back of said affidavit, petition, bond, and alternative writ appear endorsements in words and figures following, to wit:

U. S. circuit court, dist. N. Dak. Albert H. Glaspell *vs.* N. P. R. R. Co. Filed March 31, 1890. Wm. Booth, Jr., clerk. John S. Watson, att'y for def't, Jamestown, Dakota.

And thereupon, afterwards, to wit, on the 7th day of April, 1890, the return to said order was filed in said case; which return was in words and figures following, to wit:

In the Circuit Court of the United States, Eighth Circuit, District of North Dakota.

In the matter of the order to the judge of the district court of the fifth judicial district, Stutsman county, North Dakota, to show cause why he has not ordered a transfer of the files, records, and proceedings in a certain cause now pending in said court, wherein one Albert H. Glaspell is plaintiff and Northern Pacific Railroad Company is defendant.

To the honorable the circuit court of the United States for the district of North Dakota:

Whereas an order has been made and directed to the judge of the district court for Stutsman county, North Dakota, requiring the said court to transfer to the circuit court of the United States for the district of North Dakota the files, records, and proceedings in a certain action commenced in said district court Feb. 24th, 1885, wherein Albert H. Glaspell is plaintiff and Northern Pacific Railroad Company is defendant, and being directed by the Hon. Roderick Rose, judge of said court, to make due return to said order, I hereby and herewith certify and return as follows:

The said action was commenced February 24th, 1885, and was tried to a jury, before Hon. Roderick Rose, judge, at Jamestown, in

the county of Stutsman and then Territory of Dakota, commencing Nov. 20, 1888, a verdict being rendered for plaintiff Nov. 24th, 1888. A stipulation was made and filed Nov. 26, 1888, whereby the costs were stipulated and the clerk authorized to enter the same as part of the judgment. The same day a judgment was entered of record in favor of plaintiff for $12,545.43 damages and $64.15 costs. An execution was issued on said judgment Feb. 17, 1890, and is
9 now in the hands of the sheriff of Stutsman county. On Nov. 28, 1888, the court made an order extending the time for serving notice of intention to move for a new trial, for motion for new trial, and for settlement of a bill of exceptions until Jan. 28th, 1889. On Jan. 12th, 1889, time was extended by order of court for the same purposes to Feb. 28th, 1889. On Feb. 28th, 1889, time was extended as above to March 28th, 1889. The next order is as follows:

"The defendant having served upon plaintiff a proposed bill of exceptions herein, the time for settlement of same is hereby extended from March 28th, 1889, to April 10, 1889, and the time within which to serve notice of the intention to move for a new trial and within which to move for a new trial is hereby extended to April 13th, 1889.

Dated March 28th, 1889.

RODERICK ROSE, *Judge.*"

The next order is as follows:

"The time within which to present to the court for settlement the bill of exceptions served herein is hereby extended to May 31st, 1889, and the time within which to serve notice of intention to move for new trial is extended to ten days after settlement of the bill of exceptions.

RODERICK ROSE, *Judge.*"

The next and last order is as follows:

"The date for settling the bill of exceptions proposed by the defendant herein is hereby extended to June 29th, 1889. Defendant may have until ten days after the settling of said bill within which to serve notice of intention to move for a new trial and within which to move for a new trial in said action.

Dated May 23, 1889.

RODERICK ROSE, *Judge.*"

The last order was filed in my office Feb. 13th, 1889.

A bill of exceptions was signed August 30th, 1889, and filed in my office September 3rd, 1889; to which the judge made the following certificate, to wit:

I, Roderick Rose, judge of the district court for the sixth judicial district, Stutsman county, North Dakota, and the judge before whom said cause was tried, do hereby certify that a copy of the foregoing bill of exceptions was served upon the plaintiff; that more than twenty days have elapsed since such service and no amendments

thereto were proposed by plaintiff; that the settlement of said bill was regularly brought on to be heard by notice thereof served upon plaintiff; that I have carefully examined the foregoing bill of exceptions, and, finding it conformable to the truth and correct and complete in all respects, do hereby certify that the same contains all the evidence, testimony, and other matters adduced on trial of said action. * * *

But because the foregoing evidence, testimony, documents, objections, rulings, motions, orders, and exceptions do not appear of record herein, and the defendant, desiring the same to be made a part of the record, has made this bill of exceptions, and the same, being found to be correct and to contain all the evidence and testimony in this case, is now allowed, settled, signed, and endorced. Filed as a part of the records in this action this August 30th, 1889 (and within the time provided by law, as enlarged and extended by orders of the judge of this court).

RODERICK ROSE,
Judge of the District Court.

The above and foregoing certificate is hereby modified and corrected so as to conform to the facts and record in the case by striking out all that part of it in the two last lines thereof preceeeing my signature and after the words and figures "August 30th, 1889."

Done Fe-ruary 17th, 1890.

RODERICK ROSE, *Judge.*

A notice of intention to move for a new trial and a motion for a new trial was filed in my office Dec. 14th, 1889; such notice and motion and notice of hearing were served on plaintiff Sept. 3d, 1889. The notice is in the following words and figures:

Take notice that the motion for a new trial herein will be brought on for argument before the court, at chambers, at Jamestown, Dakota, on Sept. 12th, 1889, at ten o'clock a. m., or as soon thereafter as counsel can be heard.

On the margin of such notice is the following:

Hearing continued until the 21st Sept., 1889.

RODERICK ROSE, *Judge.*

The records and proceedings in said action are entered and recorded in the records of my office in the following books:

General Index, vol. 1, at page 70.
Register of Actions, vol. A, page 528.
Court Calender, Book 1, pages 55, 97, 127, 170, 221.
Court Minutes, Book A, pages 146, 174, 245, 342.
Book B, pages 29, 42 to 28, inclusive.
Order Book A, pages 164, 433, 500.
Book C, pages 9, 20, 99, 100.
Judgment Book D, page 267.
Judgment Docket A, page 119.

Such record entries cover a period from April, 1885, to Feb., 1890, and in the same books are con-ained the records of

a large number of cases other than the one in controversy. The defendant has at no time demanded of me a certified copy of transcript of the files, records, and proceedings in said action, and I have not refused the same, but defendant has demanded of me that I transfer to the circuit court the original files, records, and proceedings in said action, which demand I have refused.

Witness my hand and the seal of the district court for the fifth district, State of North Dakota.

[SEAL.]

T. F. BRANCH,
Clerk of the District Court.

Upon the back of said return appears endorsement in words and figures following, to wit:

8 A. District court, county of Stutsman. Filed April 7, 1890. Wm. Booth, Jr., clerk.

And thereupon, afterwards, on the 7th day of April, 1890, a motion to discharge the order to show cause was filed in said case; which motion was in words and figures following, to wit:

In the Circuit Court of the United States, Eighth Circuit, District of North Dakota.

In the matter of the order to the judge of the district court of the fifth judicial district, Stutsman county, North Dakota, to show cause why he has not transferred or caused to be transferred the files, records, and proceedings in a certain cause pending in said court, wherein Albert H. Glaspell is plaintiff and Northern Pacific Railroad Company is defendant.

Motion to Discharge Order.

Comes now Edgar W. Camp and S. L. Glaspell, attorneys for the judge of the district court, fifth judicial district, State of North Dakota, and move the court to discharge the order herein made, requiring the judge of said district court to transfer or cause to be transferred to the circuit court of the United States for the district of North Dakota all the files, records, and proceedings in the certain cause therein pending, wherein Albert H. Glaspell is plaintiff and Northern Pacific Railroad Company is defendant, or show cause why he has not done so, for the reason that the circuit court of the United States has no jurisdiction of the said action, nor to make or enforce such order, the court to which it is directed being a court of
12 co-ordinate jurisdiction and having rendered a final judgment upon the verdict of a jury in said action before any application or request for a transfer was made.

EDGAR W. CAMP,
S. L. GLASPELL,
Attorneys for the Judge of the State Court.

Notice of Motion.

To John S. Watson, Esq., attorney:

Take notice that the above motion will be brought to a hearing before the court, at the city of Bismarck, on the 7th day of April, 1890, at the hour of two o'clock p. m. of said day, or as soon thereafter as counsel can be heard.

EDGAR W. CAMP,
S. L. GLASPELL,
Attorneys.

Upon the back of said motion to discharge order to show cause appear endorsements in words and figures following, to wit:

U. S. circuit court, North Dakota. In the matter of the order to the judge of the fifth judicial district court to show cause, etc. Motion to discharge order to show cause. Service of the within motion is hereby admitted this 5th day of April, 1890, at Jamestown, N. D. Jno. S. Watson. Filed Apr. 7, 1890. Wm. Booth, Jr., clerk.

And thereupon, afterwards, to wit, at the May term of said court, on the 11th day of July, 1890, the following proceedings were had in said case, as appears of record on page 34 of the journal of said court:

ALBERT H. GLASPELL, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

In the matter of the application of the defendant for a writ of certiorari to the judge of the district court in and for the county of Stutsman, North Dakota, for the transfer to the circuit court of the United States for the district of North Dakota of all the files, records, and proceedings in said case in which the said petition for removal has been filed and the order to show cause made by the judge of this court in the premises.

This cause having been heard on the petition of the defendant for a writ of certiorari, and on the answer of the clerk of the Stutsman county district court to the alternative writ, as well as
13 *in* the motion to discharge the order to show cause at the April term of this court, at Bismarck, in the district of North Dakota, and the same was then and there taken under advisement; and the court, being now well and sufficiently advised in the premises, both parties now appearing in open court, sitting in the southeastern division of said district, and consenting that the decision of the court be made here and now, to have the same effect and force as though made in open court, in the southwestern division of said district—the court doth now overrule said motion to discharge the order to show cause, and doth adjudge the answer of T. F. Branch, as clerk of the district court of Stutsman county, insufficient, and doth quash the same; and doth further adjudge that said case is

one of which this court is the successor of the territorial court within the meaning of the act of Congress approved February 22d, 1889; and the clerk of this court will issue in due form a writ of certiorari, directed to T. F. Branch, as clerk of the district court of Stutsman county, North Dakota, commanding and requiring said clerk to transmit to this court, at Bismarck, all the files, records, and proceedings of said case, and certified copies of any entries in the books of all records remaining in said district court of Stutsman county in this cause.

The clerk of this court will immediately cause this order to be entered in the southwestern division of this district.

To which order discharging said order to show cause and granting the application for said writ the plaintiff duly excepts.

Thereupon, afterwards, to wit, on the 19th day of July, 1890, a writ of certiorari was issued in said case; which said writ of certiorari was in words and figures following, to wit:

In the Circuit Court of the United States, Eighth Circuit, District of North Dakota, Southwestern Division.

ALBERT H. GLASPELL, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

In the matter of the application of the defendant for a writ of certiorari to the judge of the district court within and for Stutsman county, North Dakota, for the transfer to the circuit court
14 of the United States for the district of North Dakota of all the files, records, and proceedings in said case, in which the said petition for removal has been filed, and the order to show cause made by the judge of this court in the premises.

The President of the United States of America to T. F. Branch, clerk of the district court of the fifth judicial district within and for Stutsman county, North Dakota:

Whereas it hath been represented to the circuit court of the United States for the district of North Dakota that a certain suit was commenced in the district court of the sixth judicial district within and for the said county of Stutsman, in the Territory of Dakota, on or about February 24th, 1885, wherein Albert H. Glaspell was plaintiff and The Northern Pacific Railroad Company was defendant.

That said defendant is a corporation, not banking, created and existing under and by virtue of that certain act of Congress approved July 2nd, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and by virtue of those certain subsequent acts and joint resolutions relating to the same subject-matter.

That said suit was an action arising under the laws of the United

States, and that defendant has a defense thereto arising under the laws of the United States.

That said action arose and was commenced in that portion of the Territory of Dakota which has since become one of the States of the Union, having been admitted into the Union since the commencement of said action as the State of North Dakota; that the amount involved in said action is more than two thousand ($2,000.00) dollars, exclusive of interest and costs, and is, to wit, fourteen thousand ($14,000) dollars.

That said action was pending in the district court for said Stutsman county at the time of the admission of the State of North Dakota into the Union; that said action is a suit — which the circuit court of the United States for the district of North Dakota might have had jurisdiction under the laws of the United States had such circuit court of the United States for the district of North Dakota been in existence at the time of the commencement of said action.

15 That the defendant duly filed in the district court for Stutsman county, on December 7th, 1889, its request for the transfer and removal of said cause into the circuit court of the United States for the district of North Dakota under and by virtue of the certain act of Congress approved February 22nd, 1889, entitled "An act to provide for the division of Dakota into two States, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments, and to be admitted into the Union on equal footing with the original States, and to make donations of public lands to said States," and also filed a sufficient bond, with surety, upon such transfer or removal; that the clerk of the district court for said Stutsman county, being the clerk of the court above named, has refused to transfer to the circuit court of the United States for the district of North Dakota the files, records, and proceedings relative to said case, though his legal fees therefor were tendered by said petitioner.

And the honorable judges of the circuit court of the United States for the district of North Dakota having considered the return made to the order to show cause why this writ should not issue, and having adjudged the same and the answer by you insufficient, and having quashed the said answer; and an order having been entered in open court on July 11th, 1890, directing the issuance of a writ of certiorari, as prayed for by the defendant:

You, therefore, are hereby commanded that you forthwith transfer and transmit to the circuit court of the United States for the district of North Dakota, southwestern division, all the files, records, and proceedings of said case and certified copies of any entries in the books of all records remaining in said district court of Stutsman county in said case in as full and ample a manner as the same now remain before you, together with this writ, so that the said circuit court may be able to proceed thereon and do what shall appear to them of right ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court, and the seal of said court, hereto affixed this nineteenth day of July, 1890.

[SEAL.] J. A. MONTGOMERY,
Clerk of said Circuit Court,
By EDWARD S. ALLEN, *Deputy.*

16 Attached to said writ of certiorari is the return of the marshal in words and figures following, to wit:

I hereby certify that I served the original writ of which this is a true copy on the within-named T. F. Branch by delivering the same to him at Jamestown, N. D., on the 26 day of July, 1890.

A. F. PRICE, *U. S. Marshal,*
By W. D. HODGSON, *Deputy.*

Upon the back of said writ of certiorari appear endorsements in words and figures following, to wit:

In U. S. C. C., dist. No. Dak. A. H. Glaspell *vs.* Nor. Pac. R. R. Co. Filed July 28, 1890. J. A. Montgomery, clerk. Jno. C. Bullitt, Jr., & John S. Watson, attorneys for def't, Jamestown, N. Dak.

Thereupon, afterwards, to wit, on the 29th day of July, 1890, a return to said writ of certiorari was duly made by T. F. Branch, clerk of the district court within and for the county of Stutsman, North Dakota; which said return was in words and figures following, to wit:

STATE OF NORTH DAKOTA, } *ss.*:
County of Stutsman, }

In District Court, Fifth Judicial District.

Clerk's Certificate.

I, T. F. Branch, clerk of the district court within and for the county and State aforesaid, do hereby certify that the annexed and foregoing papers, to wit, the summons, complaint, affidavit of service, note of issue, notice of trial by plaintiff, demurrer, demurrer to amended complaint, notice of trial by plaintiff, notice of motion for struck jury, order to pay ten dollars and allowing amended complaint, demand and stipulation for struck jury, amended complaint, order overruling demurrer, deposition of Dwight L. Wilbur, notice to take deposition of Dwight L. Wilbur, Exhibits A, B, C, D, and E, notarie's certificate (said notice, deposition, and exhibits being a part of the bill of exceptions), notice of trial by plaintiff, answer, subpœna by plaintiff, subpœna by defendant, stipulation relative to excuse of juror, Eshibits 1 to 30, inclusive (being part of the bill of exceptions), instructions to the jury asked for by plaintiff, instructions to jury asked for by defendant, charge to the jury by the court, verdict of the jury, judgment on the verdict, bill of costs, three orders for extension of time within which to prepare and serve bill of ex-
17 ceptions on plaintiff, three orders extending the date for settlement of the bill of exceptions served by the defendant, two

notices by defendant of date of presenting bill of exceptions for settlement, affidavit and order to show cause, bill of exceptions settled and allowed by the court, including the certificate of the judge to said bill, notice of defendant's intention to move for a new trial, motion for a new trial, notice to plaintiff of the date when such motion would be presented to the court for argument, plaintiff's admission of the service of such notice of intention, motion, and notice upon him, postponement of the date of hearing said motion by the court, petition and bond of the defendant to transfer said cause to the United States circuit court for the district of North Dakota, execution, constitute and are all the files, records, and proceedings which have been filed in my office and in the office of the clerk of the district court for Stutsman county, State of North Dakota, formerly Dakota Territory, in the case of Albert H. Glaspell, plaintiff, *versus* The Northern Pacific Railroad Company, defendant; and the said files, records, and proceedings are hereby transmitted to the United States circuit court for the district of North Dakota in obedience to a writ of certiorari issued by the United States circuit court, eighth circuit, district of North Dakota, southwestern division, and served upon me July 26th, 1890.

In witness whereof I have hereunto set my hand and official seal this July 28th, A. D. 1890.

[SEAL.] T. F. BRANCH,
Clerk of the District Court, Stutsman County, N. D.

Attached to said return was the amended complaint in said case; which said amended complaint was in words and figures following, to wit:

TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

In District Court, Sixth Judicial District.

ALBERT H. GLASPELL, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Amended Complaint.

I. Now comes the plaintiff herein, and by leave of the court files this amended complaint herein, and alleges that the
18 defendant is a corporation organized and existing under that certain act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and under those certain subsequent acts and joint resolutions of Congress relating to the same subject-matter.

II. That on or about the 1st day of February, A. D. 1883, at Jamestown, in the county of Stutsman and Territory of Dakota, the defendant, The Northern Pacific Railroad Company, then and there acting and represented by Dwight L. Wilber and John J.

Nichols, its agents, then and there authorized and empowered by the defendant to sell the lands of defendant in the county of Wells and Territory aforesaid, did at said time and place sell to this plaintiff for a valuable consideration, to wit, the sum of eight thousand nine hundred and sixty dollars, a part of which sum was then and there paid to said Dwight L. Wilber for the said defendant, the following-described land, situated in the county of Wells and Territory of Dakota, to wit, the north one-half (N. ½) of section one (1), the south one-half (½) of section thirty-five (35), the south one-half (S. ½) of section fifteen (15), the north half *half* (N. ½) of section thirty-one (31), and the north one-half of the southwest quarter (N. ½ S. W. ¼), and the north one-half of the southeast quarter (N. ½ S. E. ¼) of section thirty-one, the southwest quarter (S. W. ¼) of section three (3), all of said lands being in township one hundred and forty-five (145) north, range sixty-nine (69) west, of the fifth principal meridian; also all of section twenty-three (23), in township one hundred and forty-five (145) north, range seventy (70) west, of the 5th principal meridian.

III. That prior to said date the said defendant had appointed the said Dwight L. Wilber and John J. Nichols it- agents *and* Jamestown, in the county of Stutsman and Territory of Dakota, with power to sell its lands in Wells county, in said Territory, and various other counties of said Territory, and that from said appointment of such agents by defendant to the date of said sale of lands to plaintiff the defendant had authorized and empowered the said Dwight L. Wilber and John J. Nichols to sell its lands as aforesaid, to represent the character, quality, and situation thereof to purchasers and to this plaintiff, and to receive the purchase-money therefor, and had at all times held out said persons to the public as so authorized and empowered.

19 IV. That at the time of said sale of lands by the defendant to the plaintiff he, the plaintiff, was a resident of and present within the city of Chicago and State of Illinois, and said sale was made to plaintiff at Jamestown, as aforesaid, he then and there acting *a* and being represented by S. L. Glaspell, a resident of said city of Jamestown; that at the time of said sale, on or about February 1st, 1883, neither this plaintiff nor S. L. Glaspell had been within the limits of the said county of Wells nor had seen nor had any knowledge of the situation, character, or quality of said lands, except such as was imparted to them by the defendant and its agents, Dwight L. Wilber and John J. Nichols, for the purpose of inducing the said sale of said land, and at the time of said sale the said lands, as plaintiff is informed and believes, were covered with snow to such an extent that no examination thereof could have been made which would have disclosed their quality, and that the prairie in that vicinity was then impassable by reason of deep snow, and that no railroad was then running trains within a distance of forty miles therefrom.

V. That for the purpose of inducing plaintiff to make said purchase of said lands, and prior to said purchase, the said defendant and the said Dwight L. Wilber and John J. Nichols, acting for the

said defendant, made certain representations to plaintiff as to the character, quality, and situation of said lands, the number of settlers in its vicinity, and as to its adaptability to general farming purposes, as follows: That all of said lands were adapted to general farming purposes; that the soil thereof -onsisted of black loam surface soil from fifteen inches to two feet in depth, with clay subsoil; that it was all free from stones, sand, and gravel, except a few scattering surface stone; that it was of gently rolling surface and freee from sloughs and water holes; that part of it contained some good meadow land; that townships one hundred and forty-five, range sixty-nine, and township one hundred and forty-five, range 70, in which said lands were situated, had been surveyed by the United States Government, and that the even-numbered sections therein, known as Government lands, were thickly settled by actual settlers residing upon and cultivating their lands; that prior to said sale, for the purpose of inducing plaintiff to purcha-e said lands, as set out in paragraph 2 hereof, the defendant falsely and fraudulently represented to plaintiff that it was well seized in fee of said lands and had good right to sell and convey the same, as aforesaid.

20 VI. That after plaintiff had been induced by defendant to purchase said lands and had agreed with defendant to purchase the same and had made certain payments thereon the said defendant, by its agent, Dwight L. Wilber, represented to plaintiff that it was necessary that certain written contracts should be signed by plaintiff, and that, for some reason unknown to plaintiff, the said contracts should each be executed by a different person, but that each of said contracts could afterwards be assigned to plaintiff and deeds for the said land issued to him personally; and plaintiff states on information and belief that said contracts were executed respectively by himself, S. L. Glaspell, Heber McHugh, E. E. L. Woodward, and A. R. King, in accordance with the request and direction of the said Dwight L. Wilber, who at all times knew that all of said lands were sold to this plaintiff, and that plaintiff was the sole person in interest and furnished the money advanced to make said purchase; and this plaintiff says that he was at all times solely interested in said purchase and none of said persons were interested or contributed any part of the said purchase-money or had any connection with said sale, and that he was ignorant of the object or motive in thus executing said several contracts; and he further says that said sale was consummated prior to the execution of said contracts, and that the said representations upon which he relied in making said purchase were made prior thereto, and that he had agreed to purchase all of said lands before any of said written contracts were made. Plaintiff further says that all of said contracts were, soon after their execution, assigned to him, except the one issued to S. L. Glaspell, which was for section twenty-three, township one hundred and forty-five, range seventy, and that deeds for all of said tracts of land were made to him by the defendant, except for said section twenty-three, and for which tract a deed was made by the defendant to said S. L. Glaspell, but that plaintiff paid for the said land, as defendant well knows, and said section 23 was by said S. L. Glaspell, soon after the

execution of the said deed to him, conveyed to this plaintiff; that during A. D. 1883 and A. D. 1884 plaintiff surrendered all of said contracts for deeds for the said lands to the defendant and paid to the defendant the sum of eight thousand nine hundred and sixty dollars therefor.

VII. That, relying wholly on the said representations of the defendant and of the said Dwight L. Wilber and John J. Nichols, and without having other knowledge of the character, quality, or
21 situation said lands, the plaintiff purchased said lands of defendant in full faith and confidence in the truth of said representations so made to him.

VIII. The plaintiff further says that after he had fully paid for the said lands and at the first opportunity offered to him he personally visited and inspected the same, to wit, on or about August 1st, 1884; that prior to said date he had no knowledge or information that said lands were not as represented to him, but he then found that said lands failed to correspond with the representations made to him and hereinbefore set out, in this, that none of said lands were at the date of said purchase and sale or at any time adapted to general farming purposes or any purpose of farming; that the soil thereof did not then nor at any time consist of black loam surface soil from fifteen inches to two feet deep, with a clay subsoil, but, on the contrary, the black loam surface soil nowhere on said land exceeds a depth of six inches, and that but a small part of said lands was or is covered with any black loam whatsoever; that said lands were not free from stones, sand, and gravel, but, on the contrary, are and were almost entirely composed of stones, sand, and gravel, both upon and under the surface, to such an extent as to make it unfit for any purpose of farming or agriculture, and the greater part of said lands were and are entirely unproductive of vegetation; that it was not and is not of gently rolling surface and free from water holes and sloughs, but broken and hilly and containing many sloughs and water holes; that townships 145, range 69, and 145, range 70, had not been then surveyed by the United States Government and are not yet so surveyed; that the even-numbered sections in said townships, known as Government lands, were not then and are not now thickly settled by actual settlers residing upon and cultivating their lands, but, on the contrary, the same are entirely uninhabited and unsettled; that the defendant was not at any time well seized in fee of the lands hereinbefore described and had no title thereto at law or in equity and had no right or title thereto nor authority to convey the same and has now no such right, title, or authority.

IX. Plaintiff further alleges that said lands at the time of said sale of the same to him, had they been of the quality, character, situation, and as represented aforesaid by defendant, would have been of the actual cash value of fourteen thousand dollars, but that the same were not then nor at any time of any value whatever, but were and are entirely worthless, and that plaintiff has sustained damage by reason of the said false representations aforesaid in the sum of fourteen thousand dollars.

22 Wherefore the plaintiff prays that he have and recover judgment against the defendant herein, The Northern Pacific Railroad Company, for the sum of fourteen thousand dollars, with interest thereon, at the rate of seven per cent. per annum, from the first day of February, A. D. 1883, with his costs and disbursements.

S. L. GLASPELL,
JOHNSON NIKEUS,
Attorneys for Plaintiff.

TERRITORY OF DAKOTA, }
County of Stutsman, } ss:

S. L. Glaspell, being first duly sworn, deposes and says that the plaintiff herein is not now within this Territory; that he, affiant, is attorney for said plaintiff; that he has read the foregoing complaint and knows of his own knowledge that the matters therein stated are true, except such matters as are stated therein on information and belief, and such he believes to be true; that his means of information are that he personally acted for the plaintiff in making said purchase, and that the representations hereinbefore recited were mostly made to him, acting for plaintiff; that he was present with plaintiff in making an inspection of said lands in August, A. D. 1884.

S. L. GLASPELL.

Subscribed and sworn to before me this 13th day of January, 1886.

[SEAL.] FRANK TUCKER,
Notary Public.

Upon the back of said amended complaint appear endorsements in words and figures following, to wit:

Original. 528–29. District court, county of Stutsman. Albert H. Glaspell, plaintiff, *vs.* The Northern Pacific R. R. Co., defendant. Amended complaint. Due and sufficient service of the within amendment to complaint is hereby admitted this 16th day of January, A. D. 1886. W. E. Dodge, att'y for def't. S. L. Glaspell, attorney for plaintiff, Jamestown, Dakota. Filed in the office of clerk district court for Stutsman county, Dakota Ter., Oct. 25, 1886, at — o'clock — m. Chas. T. Hills, clerk. Filed July 29, 1890. J. A. Montgomery, clerk.

Also the answer in said case; which said answer is in words and figures following, to wit:

TERRITORY OF DAKOTA, }
County of Stutsman, }

In District Court, Sixth Judicial District.

23 ALBERT H. GLASPELL, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendants.

Answer.

For its answer to the amended complaint herein, the above-named defendant admits that it is a corporation, substantially as alleged in said amended complaint.

Further answering, said defendant denies each and ever- allegation in said complaint contained, save as hereinbefore expressly admitted, and specifically denies that by reason of any of the matters or things in said amended complaint set forth said plaintiff has been damaged in the sum of $14,000 or in any other sum whatever.

Wherefore said defendant prays to be hence dismissed with its costs and disbursements in this action.

JNO. C. BULLITT, JR., &
JNO. S. WATSON,
Attorneys for Defendant.

Service of the foregoing answer by copy thereof is hereby admitted this June 25th, 1888.

S. L. GLASPELL,
Plaintiff's Att'y.

STATE OF MINNESOTA, }
County of Ramsey, } ss:

Chas. B. Lamborn came before me personally and, being duly sworn, doth say that he is an officer, to wit, land commissioner, of the defendant in the above-entitled action; that the foregoing answer is true of his own knowledge except as to those matters therein stated on his information and belief, and as to those matters that he believes it to be true.

CHAS. B. LAMBORN.

Subscribed and sworn to before me this 22d day of June, A. D. 1888.

[SEAL.] P. P. STARIN,
Notary Public, Ramsey County, Minnesota.

Upon the back of said answer and verification by party appear endorsements in words and figures following, to wit:

District court, 6th judicial district, county of Stutsman. Albert H. Glaspell against The Northern Pacific R. R. Co. Verification by party. Filed the 20th day of November, A. D. 1888. Chas. T. Hills, clerk. Filed Jul- 29, 1890. J. A. Montgomery, clerk. 528–29.

24 Also the verdict in said case; which said verdict is in words and figures following, to wit:

TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

In District Court, Sixth Judicial District.

ALBERT H. GLASPELL, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Verdict of the Jury.

We, the jury in the above-entitled action, find for the plaintiff, Albert H. Glaspell, and against the defendant, The Northern Pacific Railroad Company, and we assess the damages in favor of the said plaintiff and against the said defendant in the sum of $12,545.43, twelve thousand five hundred and forty-five dollars and forty-three cents.

Dated this 24th day of November, A. D. 1888.

MONROE M. WRIGHT,
Foreman of the Jury.

Upon the back of said verdict appear endorsements in words and figures following, to wit:

In district court, Stutsman county. Albert H. Glaspell, plaintiff, against The Northern Pacific Railroad Company, defendant. Verdict. Filed in the office of clerk district court for Stutsman county, Dakota Ter., Nov. 26, 1888, at 9 o'clock a. m. Chas. T. Hills, clerk. Filed Jul- 29, 1890. J. A. Montgomery, clerk.

Also the judgment in said case; which said judgment is in words and figures following, to wit:

TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

In District Court, Sixth Judicial District.

ALBERT H. GLASPELL, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD CO., Defendant.

Judgment on Verdict.

At a regular term of the district court within and for the county of Stutsman, in the sixth judicial district of the Territory of Dakota, held at the court-house, in the city of Jamestown, in said county, commencing on the 13th day of November, A. D. 1888.

Present: The Honorable Roderick Rose, judge of said court, and the officers thereof.

25 This action having been tried to a jury, commencing on the 20th day of November, A. D. 1888, in said district court,

and having been concluded on the 24th day of November, A. D. 1888, and the said jury having rendered a verdict in said action for the plaintiff and against the said defendant for the sum of twelve thousand and five hundred forty-five and $\frac{43}{100}$ dollars ($12,545.43), and said verdict having been entered in the minutes and record of said court: Now, on motion of S. L. Glaspell, attorney for plaintiff, it is ordered and adjudged by the court that the said plaintiff, Albert H. Glaspell, recover of the said defendant, The Northern Pacific Railroad Company, the said sum of twelve thousand five hundred and forty-five $\frac{43}{100}$ dollars damages, together with the further sum of sixty-four and $\frac{15}{100}$ dollars, costs and disbursements, as per stipulation on file, amounting in the whole to twelve thousand six hundred and nine and $\frac{58}{100}$ dollars.

Done in open court this 26th day of November, A. D. 1888.

[SEAL.] RODERICK ROSE, *Judge.*

Attest: CHAS. T. HILLS, *Clerk.*

On the back of said judgment appear endorsements in words and figures following, to wit:

In district court, sixth judicial district, Stutsman county. Albert H. Glaspell, plaintiff, *vs.* The Northern Pacific Railroad Company, defendant. Judgment on the verdict of a jury. Filed in the office of clerk district court for Stutsman county, Dakota Ter., Nov. 26, 1888, at 2 o'clock p. m. Chas. T. Hills, clerk. Filed Jul- 29, 1890. J. A. Montgomery, clerk.

Also an order extending the time in which to prepare and serve a bill of exceptions; which said order is in words and figures following, to wit:

TERRITORY OF DAKOTA, }
Stutsman County. }

In District Court, Sixth Judicial District.

ALBERT H. GLASPELL }
vs. }
NORTHERN PACIFIC RAILROAD COMPANY. }

The term within which to serve notice of intention to move for new trial and within which to move for a new trial and within which to prepare and serve a bill of exceptions in this action is hereby extended for 60 days, to wit, until January 28th, 1889. Done by consent of counsel in open court.

Dated November 28th, 1888.

RODERICK ROSE, *Judge.*

26 Sixth Judicial District, Stutsman County, Dakota.

ALBERT H. GLASPELL
vs.
NORTHERN PACIFIC RAILROAD COMPANY.

It is ordered that defendant have until February 28th, 1889, in which to serve notice of intention to move for a new trial, to serve motion for a new trial, and within which to prepare and serve a bill of exceptions. This extension is made for the reason that the stenographer since the trial of said case has been constantly engaged in court work and has been unable up to this date to make for the defendant in this action a transcript of his notes therein.

Dated January 12th, 1889.

RODERICK ROSE, *Judge.*

Upon the back of said order appear endorsements in words and figures following, to wit:

528. District court, county of Stutsman. Albert H. Glaspell *vs.* The Nor. Pac. R. R. Co. Service of the within by copy thereof is admitted this Jan. 16th, 1889. Edgar W. Camp, pl't'ff's att'y. Filed in the office of the clerk district court for Stutsman county, Dakota Ter., Jan. 19, 1889, at 2.15 o'clock p. m. Chas. T. Hills, clerk, by T. F. Branch, deputy. Filed Jul- 29, 1890. J. A. Montgomery, clerk.

Also an order extending the time in which to prepare and serve a bill of exceptions; which said order is in words and figures following, to wit:

TERRITORY OF DAKOTA,
Stutsman County.

In District Court, Sixth Judicial District.

ALBERT H. GLASPELL, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Upon motion of the defendant and upon good cause shown, therefore it is ordered that an extension of thirty days, to wit, until March 28th, 1889, be, and the same is hereby, granted defendant within which to serve and have settled a bill of exceptions herein, and within which to serve a notice of intention to move for a new trial, and within which to move for a new trial.

Dated Feb. 28, 1889.

RODERICK ROSE, *Judge.*

Upon the back of said order appear endorsements in words and figures following, to wit:

528–29. Filed in the office of the clerk district court for
27 Stutsman county, Dakota Ter., Mar. 7, 1889, at 10 o'clock a. m. T. F. Branch, clerk. Filed Jul- 29, 1890. J. A. Montgomery, clerk.

Also an order granting extension of time in which to prepare and serve a bill of exceptions; which said order is in words and figures following, to wit:

TERRITORY OF DAKOTA, }
Stutsman County. }

In District Court, Sixth Judicial District.

ALBERT H. GLASPELL, Plaintiff, }
vs.
NORTHERN PACIFIC RAILROAD COMPANY. }

The defendant having served upon plaintiff a proposed bill of exceptions herein, the time for settlement of same is hereby extended from March 28th, 1889, to April 10, 1889, and the time within which to serve notice of the intention to move for new trial and within which to move for new trial is hereby extended to April 13th, 1889.

March 28, 1889.

RODERICK ROSE, *Judge.*

Upon the back of said order appear endorsements in words and figures following, to wit:

Filed in the office of the clerk district court for Stutsman county, Dakota Ter., Mar. 29, 1889, at 4.45 p. m. T. F. Branch, clerk. Filed Jul- 29, 1890. J. A. Montgomery, clerk. 528–29.

Also an order extending time in which to prepare and serve a bill of exceptions; which said order is in words and figures following, to wit:

TERRITORY OF DAKOTA, }
Stutsman County. }

In District Court, Sixth Judicial District.

ALBERT H. GLASPELL }
vs.
NORTHERN PACIFIC RAILROAD COMPANY. }

The time in which t- present to the court for settlement the bill of exceptions served herein is hereby extended to May 31st, 1889, and the time within which to serve notice of intention to move for new trial and within which to move for new trial is extended 10 days after the settlement of the bill of exceptions.

RODERICK ROSE, *Judge.*

Upon the back of said order appear endorsements in words and figures following, to wit:

28 Filed in the office of the clerk district court for Stutsman county, Dakota Ter., Feb. 13, 1890, at 5 o'clock p. m. T. F. Branch, clerk. Filed July 29, 1890. J. A. Montgomery, clerk.

Also an order extending the time in which to settle a bill of exceptions; which said order is in words and figures following, to wit:

TERRITORY OF DAKOTA, }
Stutsman County. }

In District Court, Sixth Judicial District.

ALBERT H. GLASPELL, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The date for settling the bill of exceptions proposed by the defendant herein is hereby extended to June 29, 1889. Defendant may have until ten days after the settling of said bill within which to serve notice of intention to move for a new trial and within which to move for a new trial in said action.

Dated May 23rd, 1889.

RODERICK ROSE, *Judge.*

On the back of said order appear endorsements in words and figures following, to wit:

Filed in the office of clerk dist. court for Stutsman county, N. Dakota, Feb. 13, 1890, at 5 o'clock p. m. T. F. Branch, clerk. Filed Jul- 29, 1890. J. A. Montgomery, clerk.

Also a notice of intention to move for new trial, notice of motion for new trial, and motion for new trial; which said notice of intention, notice of motion, and motion are in words and figures following, to wit:

TERRITORY OF DAKOTA, }
Stutsman County. }

In District Court, Sixth Judicial District.

ALBERT H. GLASPELL
vs.
NORTHERN PACIFIC RAILROAD COMPANY.

Notice of Intention to Move for a New Trial.

Take notice that the defendant, Northern Pacific Railroad Company, intends to move this court to vacate and set aside the verdict and judgment rendered and given in this action and for a new trial herein.

29 Said motion will be made upon the bill of exceptions heretofore settled and filed in this case and upon all the pleadings, papers, and proceedings on file in this action.

Said motion will be based upon the following s-atutory grounds:

I.

Insufficiency of the evidence to justify the verdict, and said verdict is against the law.

II.

Errors in law occurring at the trial of the case and duly excepted to by the defendant, Northern Pacific Railroad Company.

JOHN C. BULLIT, JR.,
JOHN S. WATSON,
Attorneys for the Northern Pacific Railroad Company.

To S. L. Glaspell, Johnson Nickeus and Edgar W. Camp, attorneys for plaintiff, Jamestown, Dakota.

Take notice that the motion for a new trial herein will be brought on for argument before the court at chambers, at Jamestown, Dakota, on Sept. 12, 1889, at 10 o'clock a. m., or as soon thereafter as counsel can be heard.

JOHN S. WATSON,
Def't's Att'y.

To S. L. Glaspell, pl't'ff's att'y.

On the margin of said notice appear endorsements in words and figures following, to wit:

Hearing continued until the 21st Sept., 1889. Roderick Rose, judge.

On the back of said notice appear endorsements in words and figures following, to wit:

Filed in the office of clerk district court for Stutsman county, N. Dakota, Dec. 14, 1889, at 9.30 o'clock a. m. T. F. Branch, clerk.

TERRITORY OF DAKOTA, }
Stutsman County. }

In District Court, Sixth Judicial District.

ALBERT H. GLASPELL, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Motion for a New Trial.

To S. L. Glaspell, Johnson Nickeus and E. W. Camp, attorneys for above-named plaintiff:

30 Take notice that upon the bill of exceptions settled and filed herein, the pleadings, and records of all the proceedings in said cause the defendant now moves the court for an order that the verdict and judgment herein be vacated and set aside and a new trial granted for the following causes materially affecting the substantial rights of the defendant:

I.

Insufficiency of the evidence to justify the verdict, and that the same is against the law.

1. There is no evidence and the evidence is insufficient to show

that the plaintiff ever purchased from the defendant the lands described in the complaint or any of them.

2. There is no evidence that prior to the date of the alleged sale — said lands to plaintiff or at any other time the defendant had appointed Dwight L. Wilber and John J. Nichols or either of them its agents or agent, with power to sell its lands in Wells and other counties in this Territory.

3. There is no evidence that defendant at any time authorized and empowered Dwight L. Wilber and John J. Nichols or either of them to represent to plaintiff or to any one the character, quality, and situation of defendant's lands.

4. There is no evidence that defendant at any time authorized and empowered said Dwight L. Wilber and John J. Nichols or either of them to receive the purchase-money for the sale of any of defendant's lands.

5. There is no evidence that defendant ever held out said Dwight L. Wilber and John J. Nichols or either of them as authorized and empowered to sell the lands of defendant or to make representations to intending purchasers or to plaintiff respecting the character, quality, and situation of said lands, or to receive money in purchas- of the same. There is no evidence that defendant held out said persons or either of them as agents authorized or empowered to do any or either of said acts.

6. There is no evidence that Dwight L. Wilbur and John J. Nichols or either of them were acting within the scope of their or his authority as agents of the defendant when they or he made to plaintiff the alleged false representations respecting the character, quality, and situation of said lands.

II.

Errors in law occur-ing at the trial of the case and duly ex-
31 cepted to by the defendant.

1. In denying the defendant's objection, made at the beginning of the trial, to the introduction of any evidence on the part of the plaintiff for the reason that the complaint does not state facts sufficient to constitute a cause of action against the defendant.

2. In permitting the witness McHugh to answer the question: "Were these lots in Livingston, in which the firm of Wilbur & Nichols dealt, the railroad company's lots?"

3. In permitting the witness McHugh to answer the question: "State as fully as you can what written or printed matter was in possession of Wilbur and Nichols on which they based their sales and representations, if they made any, upon Livingston lots."

4. In permitting the witness McHugh to answer the question: "You have stated that Wilbur and Nichols made frequent sales trades of railroad land; you may now state whether or not in negotiating the-e deals and sales they made an- written and oral or written or oral representations as to the character and value of lands which they sold."

5. In permitting the witness McHugh to answer the question:

"You have already answered that matter was furnished; you may state the general character of it—that is, whether it was in the shape of books or manuscripts or both."

6. In permitting the witness McHugh to answer the question: "Now, you may state what you know, from the beginning of these negotiations to the conclusion thereof, concerning the sale of these lands to Mr. Glaspell."

7. In permitting the witness Johnson Nickeus to answer the question: "By whom did these ratings purport to have been made on the face of them?"

8. In permitting the witness Nickeus to answer the question: "Were these books of rating in general use by your firm?"

9. In permitting the witness Nickeus to answer the question: "In selling these lands did your firm ever receive the first payment for the sale of the land?"

10. In permitting the witness W. E. Greene to answer the question: "Did or did not Wilbur and Nichols make statements to you concerning the character and quality of the lands which you were intending to purchase?"

11. In permitting the witness George R. Topliff to answer the question: "Did Wilbur make any representations to you as to the character and quality of these lands?"

32 12. In permitting the witness A. H. Glaspell to answer the question: "State the substance of the first letter which you wrote to Mr. Glaspell concerning investment in lands in Dakota."

13. In permitting the witness A. H. Glaspell to answer the question: "You may state as fully as you can the conversation which took place between yourself and Mr. Trott."

14. In permitting the witness A. H. Glaspell to answer the question: "State if you purchased from the Northern Pacific Railroad Company the lands mentioned and described in the complaint."

15. In permitting the witness A. H. Glaspell to answer the question: "Now state as fully as you can what these representations which purported to come from Nickeus, Wilbur and Nichols were."

16. In permitting the witness A. H. Glaspell to answer the question: "State whether or not in making these purchases of railroad lands you relied upon the ratings which you received and upon statements of Herman Trott and upon statements that you received from your brother, S. L. Glaspell, as coming from the agents of the defendant, Nickeus, Wilbur and Nichols."

17. In permitting the witness A. H. Glaspell to answer the question: "State whether or not you inquired of Herman Trott at that time the meaning of the ratings—the method of rating the lands."

18. In permitting the witness A. H. Glaspell to answer the question: "You may state if you informed Mr. Trott from what source you obtained the printed matter which you showed to him."

19. In permitting the witness A. H. Glaspell to answer the question: "You may state fully what Mr. Trott said to you in regard to the method of rating these lands."

20. In permitting the witness A. H. Glaspell to answer the question: "State whether any person besides yourself was intere-ted in

the purchase which you made of the lands described in the complaint."

21. In permitting the witn-ss A. H. Glaspell to answer the question: "State whether or not you ever informed the company as to the discrepancy between the description and the actual condition of the lands."

22. In permitting the witness A. H. Glaspell to answer the question: "Now you may state fully what you said to the general land agent at that time."

23. In permitting the witness A. H. Glaspell to answer the question: "State as nearly as you can the conversation in regard to what representations were formerly made to you."

33 24. In permitting the witness A. H. Glaspell to answer the question: "What, if anything, did you say as to the representations which had been made you before you had purchased the lands?"

25. In permitting the witness S. L. Glaspell to answer the question: "Did you make all the applications in the name of your brother?"

26. In overruling defendant's objections to the introduction in evidence of certain copies of ratings, marked Exhibits 1, 2, 3, and 4 on the part of plaintiff.

27. In permitting the witness S. L. Glaspell to answer the question: "What is the reason that you hadn't examined the lands before consum-ating their purchase?"

28. In permitting the witness S. L. Glaspell to answer the question: "State what these exhibits (attached to deposition of D. L. Wilbur)—when they were signed, rather."

29. In permitting the witness S. L. Glaspell to answer the question: "What moved you to make this investment? Had you concluded to make the investment upon the representations made by Nickeus and Wilbur before you were directed by your brother to do so, in reference to the representations made by Mr. Trott to go to Nichols and Wilbur, or was it upon the ratings represented by Wilbur & Nichols and referred to by Mr. Trott that induced you to purchase the lands?"

30. In denying defendant's motion "to strike out all the evidence of the plaintiff relative to his having consum-ated the purchase of the lands or any part thereof described in the complaint upon the ground that such evidence is parol or verbal and it is not admissable and does not show that the plaintiff has at any time acquired title to these lands from the Northern Pacific Railroad Company."

31. In permitting plaintiff to reopen his case and introduce further testimony in support of his cause of action.

32. In permitting the witness George W. Board to answer the question: "What was his (Herman Trott) business in March, 1883?"

33. In permitting the witness Board to answer the question: "What was his (Trott) business in June, 1883?"

34. In permitting the witness Geo. W. Board to answer the question: "What position was he (Trott) holding at the date of this?"

35. In permitting the witness Board to answer the question (with

respect to Exhibits 5 to 18 on the part of plaintiff): "Is that the signature of Mr. Trott?"

36. In permitting the witness Board to answer the question: "What position, if any, did he (A. F. Berrian) hold in 1884?"

34 37. In permitting the witness Board to answer the question (with respect to Exhibits 5 to 18 on the part of the plaintiff): "Is that his (Berrian's) signature?"

38. In denying defendant's motion for continuance, made "upon the ground that a trial of the issues of the case on the theory that these contracts for the sale of these lands *was* made on March 12th, 1883, instead of the time mentioned in the complaint, will prejudice the defendant, who cannot safely proceed to trial without further preparation upon that point in the case.

39. In overruling defendant's objection to the introduction in evidence of Exhibit No. 5 on the part of the plaintiff.

40. In permitting the witness A. H. Glaspell to answer the question: "For what purpose did you surrender it (Exhibit 5)?"

41. In permitting the witness A. H. Glaspell to answer the question: "When you made these payments did you obtain receipts for the same?"

42. In permitting the introduction in evidence of Exhibit # 6 on part of the plaintiff.

43. In permitting the witness A. H. Glaspell to answer the question: "State if you received this receipt (Exhibit # 6 on the part of the plaintiff) upon surrendering this contract (Exhibit No. 5)."

44. In permitting the witness A. H. Glaspell to answer the question: "From whom did you rece-ve this Exhibit # 24 on the part of the plaintiff for identification?"

45. In permitting the witness A. H. Glaspell to answer the question: "Is this Exhibit # 24 one of the contracts mentioned in the complaint?"

46. In overruling defendant's objections to the introduction in evidence of Exhibits # 7 on the part of the plaintiff.

47. In permitting the witness A. H. Glaspell to answer the question: "In order, if possible, to expedite matters, I will now hand to the witness Exhibit A on the part of the defendant for identification, Exhibit B on the part of the defendant for identification, Exhibit C on the part of the defendant for identification, Exhibit E on the part of the defendant for identification, Exhibit D on the part of the defendant for identification, Exhibit 17 on the part of the plaintiff for identification, Exhibits Numbers 18, 19, 20, 21, 22, and 23 on the part of the plaintiff for identification. Witness is handed these exhibits and is asked to examine them and state whether they are the contracts mentioned in the complaint."

48. In permitting the witness A. H. Glaspell to answer the question: "Are they, together with the two contracts already introduced in eviden-e, the contracts and all the contracts mentioned in the complaint?"

35 49. In permitting the witness A. H. Glaspell to answer the question: "Was any person other than yourself interested in these contracts or in any of them?"

50. In permitting the witness A. H. Glaspell to answer the question: "Have you paid the consideration named in these contracts and in all of them?"

51. In overruling defendant's separate and several objections "to the introduction in evidence of each of the following exhibits on the part of the plaintiff, viz., Exhibits Numbers 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19."

52. In overruling defendant's objections "to the introduction in evidence of Plaintiff's Exhibits Numbers 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30."

53. In permitting the witness A. H. Glaspell to answer the question: "Did you upon the surrender of these contracts receive deeds?"

54. In permitting the witness A. H. Glaspell to answer the question: "You may explain, if you know, why these contracts introduced in evidence and not made with Albert H. Glaspell were made with the parties named therein as parties of the second part."

55. In permitting the witness S. L. Glaspell to answer the question: "Were any of these contracts sent to you after the first payment was made?"

56. In permitting the witness S. L. Glaspell to answer the question: "State whether or not you fully informed Wilber and Nichols for whose benefit these contracts were to be made."

57. In denying defendant's motion to instruct the jury to return a verdict for the defend-nt on the ground that the plaintiff has not proved facts sufficient to constitute a cause of action against the defendant.

58. In sustaining plaintiff's motion as not responsive the answer of witness George W. Board: "There were existing instructions against it com-unicated by myself, and if this was done at all it was done outside the office."

59. In permitting the witness McHugh up-n rebuttal to answer the question: "State if you know who were the real parties. I want the witness to state what facts he knew Wilbur to be possessed of regarding that point."

60. In permitting witness S. L. Glaspell upon rebuttal to answer the question: "He also testifies tha- at the time these applications were made that they were made for the benefit of persons whose names appeared on the applications. Is that statement true?"

36 61. In refusing to give the following instructions to the jury, as requested by the defendant:

A. The jury is instructed to find a verdict for the defendant.

B. Unless the jury believe from the evidence that the firm of Nickeus, Wilbur & Nichols had authority from the defendant to make representations to purchasers of the character alleged to have been made in this case of defendant's land, your verdict must be for the defendant.

C. There is no evidence that said firm had such authority.

D. Purchasers dealing with Nickeus, Wilbur and Nichols as agents of defendant were bound to ascertain the extent and scope of the authority of the firm of said Nickeus, Wilbur and Nichols as such agents.

E. There is no evidence in this case that the firm of Nichols, Wilbur and Nichols, as defendant's agents, had any authority to make any representations wha-ever respecting the lands described in the complaint.

F. The evidence in this case shows that the firm of Nickeus, Wilbur and Nichols, as agents for defendant, were authorized merely to solicit purchasers for defendant's lands, and to forward or tr-nsmit the applications of such purchasers to purchase to defendant at St. Paul, and this authority did not include the power to make to said purchasers any representations as to defendant's lands.

G. If S. L. Glaspell knew, or if, as an ordinar-y cautious and prudent man, in the exercise of ordinary diligence, he ought to have known, that the firm of Nickeus, Wilbur and Nichols, as agents of the defendants, were not authorized and empowered to make any such representations as to the defendant's lands, then said S. L. Glaspell had no right to rely up-n the representations of said firm of Nickeus, Wilbur and Nichols or any member thereof as to the lands described in the complaint.

H. If S. L. Glaspell, prior to the consummat-on of the purchase of the lands described in the complaint, received from any person or persons other than the defendant or its agent or agents any information to the effect that the lands described in the complaint were of an inferior quality and not adapted for general fa-ming purposes, or differed materially in any respect from their character or quality as represented by defendant or its agent or agents, such information put said Glaspell on his inquiry as to the actual quality of said lands, and he — no right to rely on the representations of defendant or its agent or agents as to the character or quality
37 of said lands, and if said Glaspell, under such circumstances, chose to rely upon such representations of said defendant or its agent or agents he did so at his peril, and plaintiff cannot complain if such representations were false in fact.

I. If S. L. Glaspell, prior to or in the consum-ation of the sale and purchase of the land described in the complaint, was not, as an ordinarily careful and prudent man, in the exercise of ordinary diligence, justified in relying *ypon* the statement or representations of defendant or its agent or agents as to the character or quality of the lands described in the complaint, then he was guilty of such negligence in relying upon such statements or representations as prevents a recovery in this action.

J. If an ordinar-y prudent man, acting in an ordinarily prudent and careful manner, in consum-ating a purchase of lands such as was made in this case, would not have relied *ypon* such statements and representations as are alleged to have been made in this case by the defendant or its agent or agents concerning the lands, but would have sought information as to, and could thereby have ascertained the true facts relative to, said lands from other sources, then S. L. Glaspell was guilty of negligence in relying upon the representations of defendant and its agents concerning the lands described in the complaint, and plaintiff cannot recover.

K. In order to find a verdict in this case against the defendant

on account of false or fraudulent representations made by D. L. Wilbur, the jury must believe from the evidence that D. L. Wilbur not only made representations which were false in fact, but also that said D. L. Wilbur at the time he made such representations knew that they were false in fact.

L. In order to find a verdict in this case against the defendant on account of false or fraudulent representations made by John J. Nichols, the jury must beli-ve from the evidence that John J. Nichols not only made representations which were false in fact, but also that said John J. Nichols at the time he made such representations knew that they were false in fact.

M. If an ordinarily cautious and prudent man under all the circumstances of this case would have personally or by agent examined and inspected the said lands before purchasing them, then it was plaintiff's duty to have examined and inspected said lands before purchasing them, and a failure to do so was such negligence as prevents a recovery in this action.

38 N. These lands are situated in Wells county, Dakota, in two congressional townships which are contiguous to the northern boundary of Stutsman county, D. T., wherein S. L. Glaspell resided during all the years 1882 and 1883. If, therefore, said S. L. Glaspell, as an ordinarily cautious and prudent man, in the exercise of ordinary diligence, should have examined said lands before consummating their purchase and failed to do so, the verdict must be for the defendant.

O. If the jury believe from the evidence that an ordinary cautious and prudent man, in the exercise of ordinary diligence, having due regard to all the circumstances of this case, could and would have examined said lands before purchasing the same, and that neither plaintiff nor S. L. Glaspell did examine them prior to the purchasing, the verdict must be for the defendant.

P. If the jury believe from the evidence that S. L. Glaspell, as plaintiff's agent, signed the latter's name to the application to purchase land from the defendant, marcked Exhibit "A" in D. L. Wilbur's deposition, on file and in evidence in this case, prior to purchasing the lands described in the complaint, then said plaintiff and S. L. Glaspell are charged with knowledge of and are bound by all the printed matter contained in said Exhibit "A," and plaintiff cannot recover.

Q. There is no evidence in this case from which the jury can find that defendant ever ratified the wrongful acts, if any, of the firm of Nickeus, Wilbur and Nichols or any member thereof.

R. If S. L. Glaspell signed any of the applications marked Exhibits A, B, C, D, and E, attached to D. L. Wilbur's deposition, prior to concluding the negotiat-ons for the purchase of said lands, he is charged with knowledge of the fact that the firm of Nickeus, Wilbur and Nichols, as defendant's agents had no authority whatever to make any representations concerning defendant's lands which would be binding upon defendant.

S. If the jury believe upon the evidence that S. L. Glaspell, prior to closing the contract with defendant for the purchase of land de-

scribed in the complaint, knew or ought to have known that defendant's agents, Nickeus, Wilbur and Nichols, had no authority to make any representations concerning said land, your verdict must be for the defendant.

T. In no event is the plaintiff entitled to recover with respect to any land described in the complaint, except those which are described in the contracts signed by Albert H. Glaspell and Heber McHugh respectively.

39 U. The measure of damages in this case is the difference between the actual value of the lands at the time the purchase was made and what their value would have been at such time if the representations alleged to have been made concerning them had been true.

V. If the jury believe from the evidence that the contract for the purchase of said lands were made in the names of different individuals, under and in pursuance of an understanding or agreement between D. L. Wilbur, S. L. Glaspell, and Heber McHugh, and for the purpose of procuring from defendant increased commissions for the sale of said lands, and that the said commissions were to be divided between said Wilbur, S. L. Glaspell, and McHugh, then you are instructed that the method of making said contracts was a fraud upon defendant, and the plaintiff cannot recover in this action upon any of said contracts except those which were signed personally by him.

W. The jury is instructed that if they believe from the evidence that any witness in this case has knowingly, wilfully, and falsely testified as to any fact or facts concerning which he was interrogated, then you may apply the maxim, *Falsus in uno, falsus in omnibus*—that is to say, false in one thing, false in all things—and may disregard the entire testimony of such witness.

X. The jury is instructed that the contracts offered in evidence by plaintiff and admitted by the court, not having been read to the jury and their reading not having been waived by defendant, cannot be considered by the jury.

Y. The jury is instructed that the exhibits of plaintiff marked numbers 1, 2, 3, and 4, respectively, offered in evidence by the plaintiff and admitted by the court, not having been read or exhibited to the jury and their reading or exposition not having been waived by the defendant, are not evidence in this case.

62. In giving the following instructions to the jury upon plaintiff's motion:

A. The relation of principal and agent may be established by circumstantial evidence, and proof that one is openly acting as agent for another under such circumstances as imply knowledge on the part of the latter is evidence that the former is the latter's agent.

B. It is for you, gentlemen of the jury, to de-ermine from the evidence whether or not Herman Trott was, at the time of the transactions mentioned in the complaint, a general agent of the defendant for the sale of lands, and whether or not he had authority to make the contracts which have been introduced in evidence.

40 C. It is for you, gentlemen of the jury, to determine from the evidence whether or not Nickeus, Wilbur and Nichols were

at the time of the transactions mentioned in the complaint general agents of the defendant for the sale of lands.

D. If you find from the evidence that Nickeus, Wilbur and Nichols were at the time of the transaction mentioned in the complaint general agents for the defendant for the sale of lands, then any contract or agreement made by them, within the scope of their authority, would be binding on the defend-nt, although as between them and the defendant there might be a restriction upon their authority, provided that the person with whom the contract or agreement was made had no notice of such restriction.

E. If you find from the evidence that Herman Trott was at the time of the transaction mentioned in the complaint a general agent of the defendant for the sale of lands, then any contract or agreement made by him, within the scope of his authority, would be binding on the defendant, although as between said agent and the defendant there might be a restriction on the agent's authority, provided that the person with whom the contract or agreement was made had not notice of such restriction.

F. If you find from the evidence that Nickeus, Wilbur and Nichols were at the time of the transactions mentioned in the complaint general agents of the defendant for the sale of lands, then the defendant i- responsible for the negligence of Nickeus, Wilbur and Nichols or any of them in the transaction of the business of such agency, including wrongful acts committed by such agents or any of them in and as a part of the transaction of such business, and for their wilfull omission to fulfill the obligations of the defendant.

G. If you find from the evidence that Herman Trott was at the time of the transactions mentioned in the complaint a general agent of the defendant for the sale of lands, then the defendant is responsible for the negligence of said Trott in the transaction of the business of such agency, including wrongful acts committed by such agent in and as a part of the transactions of such business, and for his wilfull omission to fulfill the obligations of the defendant.

H. To entitle the plaintiff to maintain the action for deceit by false representations he must show that the defendant, or the defendant's agent or agents, acting within the scope of their authority, made false and fraudulent representations in regard to some fact or
41 facts material to the transaction of the sale of the lands described in the complaint to the plaintiff by the defendant, by reason of which false and fraudulent representations the plaintiff was induced to enter into the contract of purchase and sale. It is not ever misrepresentation relating to such transaction which will enable the plaintiff to recover. The misrepresentation must be as to matters of fact then existing and material to the plaintiff's interests, and not matters of opinion, judgment, probability, or expectation. The misrepresentation must be of something material, constituting an inducement or motive to the act and in regard to which he placed trust and confidence in the misrepresentations.

I. If you find from the evidence that Nickeus, Wilbur & Nichols were general agents of the defendant for the sale -f lands, then the plaintiff has a right to rely upon the representations of the said

agents or any of them concerning the character and quality of the lands which said agents were authorized to sell, provided you also find that the lands could not at the time of the sale be, with reasonable diligence and effort, examined by reason of their distance from the plaintiff or of their being covered with snow or from any other cause.

J. If you find from the evidence that Nickeus, Wilbur and Nichols were general agents of the defendant for the sale of lands, and sold to plaintiff the lands described in the complaint, and prior to such sale they or either of them made to the plaintiff false representations and statements concerning the character and quality of said lands, and that such false representations were as to facts then existing and material interests, and were not merely as to matters of opinion, judgment, probability, or expectation, but were of something material, constituting an inducement or motive to the plaintiff to purchase, and that the plaintiff was actually misled by such representations to his injury, and placed reliance and confidence in such representations in making such purchase; and if you further find that the plaintiff could not at the time of such sale, by use of reasonable diligence and effort, have examined said lands by reason of their distance or from their being covered with snow, or from any other cause, and that the plaintiff purchased said lands relying upon the truth of such representations and because he believed them to be true, then your verdict will be for the plaintiff and against the defendant.

K. If you find from the evidence that Herman Trott was a general agent of the defendant for the sale of lands at the time
42 of the transactions mentioned in the complaint, then the plaintiff has a right to rely upon the representations of said Trott as to the character and quality of the lands which said Trott was authorized to sell, provided that you also find that the lands mentioned in the complaint could not be at the time of such sale, with reasonable diligence and effort, examined by the plaintiff by reason of his distance from them or from their being covered with snow, or from any other cause.

L. If you find from the evidence that Herman Trott was at the time of the transactions mentioned in the complaint a general agent of the defendant for the sale of lands, and that prior to the sale to the plaintiff by the defendant of the lands mentioned in the complaint the plaintiff applied to said Trott for information as to said lands, and that said Trott informed the plaintiff that ratings of said lands were in the possession of Nickeus, Wilbur and Nichols, and directed the plaintiff to apply to said Nickeus, Wilbur and Nichols and get said ratings, and that he, the plaintiff, might rely upon the correctness of said ratings; and if you find that the plaintiff did thereupon, and before purchasing said lands or any of them, apply to said Nickeus, Wilbur and Nichols for said ratings and obtain them or copies them; and if you find that said ratings contained material misrepresentations as to the character and quality of said lands, and that such misrepresentations were as to facts then existing and material to the plaintiff's interests and were not merely as

to matters of opinion, judgment, probibility, or expectation, but were something material, constituting an inducement or motice fo- the plaintiff to purchase said lands, and that plaintiff purchased said lands, and that in purchased said lands he was actually misled by such representations, and because he believed them to be true; and if you further find that at the time of making such purchase the plaintiff could not, with reasonable diligence and effort, have examined said lands by reason of his distance from them or from their being covered with snow, or from other cause, then your verdict must be for the plaintiff and against the defendant.

M. A deceit is either the suggestion of a fact or that which is not true by one who does not believe it to be true, the assertion of a fact of that which is not true by one who has no reasonable grounds for believing it to be true, or the suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likel- to mislead for want of communication of that fact.

43 N. If you find for the plaintiff and against the defendant you will allow the plaintiff damages in a sum equal to the difference between the actual value of -he lands purchased at the time of the purchase of the same by the plaintiff from the defendant and what the value of the same land at the same time would have been had the lands been such lands as they were represented to be.

O. If you find from the evidence that the plaintiff was induced by the false and fraudulent representations of Herman Tortt or Nickeus, Wilbur and Nichols or any of them acting, within the scope of their authority for the sale of the lands of the defendant, to purchase said lands; and if you further find that the plaintiff, upon ascertaining the falsity of such representations and the true character and quality of sai- lands, at once fully informed the defendant, through its general land agent, of such misrepresentations which had been made to him, and of the fact that he had been by such -representations induced to purchase said lands; and if you fur-her find that the defendant thereupon r-fused to rescind said sale, but retained the purchase-money therefor, then the defendant has ratified the acts of its agents in making false repr-sentations in the sale of said lands, and the defendant is liable to the plaintiff for such damage as the plaintiff has suffered thereby.

P. An agency may be created and an authority conferred by a prcedent authorization or a subsequent ratification.

63. In giving the following instructions to the jury upon the court's own motion:

A. If you should find that Nickeus, Wilbur and Nichols were not the general agents of defendant, and that the sale was made by them to plaintiff, then you should find whether defendant has ratified or approved their action in making the same by retaining the consideration paid for the lands covered by the sale.

B. Unless required by or under authority of the law to employ that particular agent, the principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including the wrongful acts committed by such agent

in and as a part of the transaction of such business and for his wilful omission to fulfil the obligations of his principal.

C. If an agent defraud the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may rescind the contract when he discovers the fraud on the terms of making complete restitution; but as long as he retains the
44 benefit of the dealings he cannot claim immunity on the ground that the offence was committed by his agents and not by himself. He must adopt the wh-le contract, including the statements and representations which induced it, or he must repudiate the contract altogether.

D. Now, gentlemen, if you find that there was a sale of the land by Nickeus, Wilber and Nichols to plaintiff, and that they were the general agents of the defendant for that purpose, and that the said firm or either of them did make the alleged false and fraudulent representations to plaintiff, communicated through his brother, S. L. Glaspell, prior to the consum-ation of said sale, for the purpose of inducing the plaintiff to purchase the said lands, and that said representations were false and untrue, and that the plaintiff, relying upon the representations as being true, purchased the said lands, and that the plaintiff would not have entered into the contract if the fals- representations had not been made, and that plaintiff was damaged by reason of such false and fraudulent representations, then your verdict must be for the plaintiff and against the defendant in such a sum as is equal to the difference between what the lands were actually worth and what they would have been worth had they been as represented at the time the sale was made.

E. If you find that Nickeus, Wilbur and Nichols did make the false and fraudulent representations to plaintiff prior to the consum-ation of the sale for the purpose of inducing the plaintiff to purchase the said lands, and that plaintiff, relying upon such repre-se-tations as being true, and that such representations were false and untrue, and that plaintiff has suffered damages by reason of such false and fraudulent representations, and that the said firm of Nickeus, Wilbur and Nichols did not have authority to make such representations, and that after the said representations were made to plaintiff, as soon as he found out that said representations were false and untrue, — went to the general land commissioner of the defen-ant and appraised said commissioner of the fraud which h-d been perpetrated upon him, plaintiff, by the false representations in said sale, and offered to rescind the same and receive back the money he had paid for said lands or its equivalent, and the general land commissioner refused to rescind the sale and return to plaintiff the money he had paid thereon or its equivalant, and that the defendant still retains the consideration paid for said land,
45 then your verdict must be for the plaintiff in a sum equivalent to the difference between the actual value of the said lands and the value of the said lands as they would have been had they been as represented at the time of the sale.

F. Unless required by or under the authority of law to employ that particular agent, the principal is responsible to third persons

for the negligence of his agent in the transaction of the business of his agency, including wrongful acts committed by his agent in and as a part of the transaction of such business and for his wilful omission to fulfil the obligations of the principal. A principal is responsible for no other wrongs committed by his agent than those mentioned in the paragraph last read, unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service.

Upon the back of said motion for new trial appear endorsements in words and figures following, to wit:

District court, county of Stutsman. A. H. Glaspell *vs.* Nor. Pac. R. R. Co. Motion for new trial. Service of the within by copy is admitted this Sept. 3rd, 1889. S. L. Glaspell, pl't'ff's att'y. John S. Watson, attorney for defendant, Jamestown, Dakota. Filed in the office of the clerk district court for Stutsman county, N. Dakota, Dec. 14, 1889, at 9.30 o'clock a. m. T. F. Branch, clerk. Filed Jul-29, 1890. J. A. Montgomery, clerk.

Thereupon, afterwards, to wit, on the 22nd day of August, 1890, a motion to remand was filed in said case; which said motion is in words and figures following, to wit:

In the Circuit Court of the United States for the District of North Dakota.

ALBERT H. GLASPELL
vs.
NORTHERN PACIFIC RAILROAD COMPANY.

Motion to Remand.

Now comes the plaintiff, Albert H. Glaspell, and moves to remand this cause to the district court of the State of North Dakota for the county of Stutsman, from whence it was removed to this court, upon the following grounds, to wit:

46 I.

This action was tried to a jury; verdict and judgment rendered November 28th, A. D. 1888, in the State court. No appeal has been taken from such judgment; no motion for a new trial made; no bill of exceptions settled, and the action is not pending for any purpose.

II.

This court has no right or jurisdiction to bring this case into this court by certiorari.

III.

No transcript of the record, files, and proceedings has been filed in this court.

S. L. GLASPELL,
EDGAR W. CAMP,
Attorneys for Plaintiff.

Notice of Motion.

To John S. Watson, Esq.:

Take notice that the foregoing motion will — heard before Hon. A. D. Thomas, at chambers of the United States court at Fargo, North Dakota, on the fifth day of September, A. D. 1890, at the hour of ten o'clock a. m. of said day, or as soon thereafter as counsel can be heard.

S. L. GLASPELL,
Attorney for Plaintiff.

Upon the back of said motion to remand appear endorsements in words and figures following, to wit:

United States circuit court, North Dak. Albert H. Glaspell *vs.* Northern Pacific Railroad Company. Motion to remand. Service of the within is hereby admitted this 21st day of Aug., 1890, at Jamestown, N. D. Jno. S. Watson, def't's att'y. S. L. Glaspell, att'y for pl't'ff. Filed August 22, 1890. J. A. Montgomery, clerk, by Edw'd S. Allen, deputy.

Thereupon, afterwards, to wit, on the 8th day of October, 1890, an order denying the motion to remand was filed in said case; which said order is in words and figures following, to wit:

United States Circuit Court for the District of North Dakota, Eighth Circuit, Southeastern Division.

ALBERT H. GLASPELL
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY.

47 *Order Denying Motion to Remand.*

And now, on this 8th day of October, A. D. 1890, this cause coming on to be heard on m-tion of the plaintiff to remand this cause to the district court of the State of North Dakota for Stutsman county, the same having been transferred to this court from the territorial court in and for Stutsman county, pursuant to section 23, chapter 180, of the laws of the United States for 1889, the plaintiff, objecting to the jurisdiction of this court, moves to remand on the following grounds:

First. That this action was tried to a jury; verdict and judgment rendered November 26th, 1888, in the said territorial court. No appeal has been taken from said judgment; no motion for a new trial made; no bill of exceptions settled, and the action is not pending for any purpose.

Second. This court has no right or jurisdiction to bring this cause into this court by certiorari.

Third. No transcript of the record, files, and proceedings has been filed in this court.

And both parties appearing—the plaintiff by S. L. Glaspell, his attorney, and the defendant by John S. Watson and Ball and

Smith, its attorneys—and consenting that the motion and proceedings herein be made and determined by the court, sitting at Fargo, in the southeastern division of said district—

After hearing counsel, it is ordered by the court that the motion to remand be, and the same is hereby, denied; to which ruling the plaintiff now duly excepts, and his exception is allowed and now made a part of the record in this action.

Done in open court this 8th day of October, A. D. 1890.

ALFRED D. THOMAS,
U. S. District Judge.

On the back of said order appear endorsements in words and figures following, to wit:

Albert H. Glaspell *vs.* Northern Pacific Railroad Co. Filed Oct. 8, 1890. J. A. Montgomery, clerk, by H. G. Edwards, deputy. Order denying motion to remand. 8.

Thereupon, afterwards, to wit, on the 8th day of October, 1890, a notice of argument on the motion for new trial was filed in said case; which said notice is in words and figures following, to wit:

48 In the United States Circuit Court, District of North Dakota, Eighth Circuit

ALBERT H. GLASPELL, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Take notice that the motion for a new trial heretofore made in this action will be brought on for hearing before this court, at the chambers of the judge of said court, at Fargo, North Dakota, on September fifth, 1890, at 10 o'clock a. m. of that day, or as soon thereafter as counsel can be heard.

JOHN S. WATSON,
Def't's Att'y.

To S. L. Glaspell, plaintiff's att'y.

Service of the foregoing by copy is admitted this August 22nd, 1890.

S. L. GLASPELL,
Pl'ff's Att'y.

On the back of said notice appear endorsements in words and figures following, to wit:

8. U. S. C. C. A. H. Glaspell *vs.* N. P. R. R. Co. Filed Oct. 8th, 1890. J. A. Montgomery, clerk. John S. Watson, attorney for def't, Jamestown, Dakota.

Thereupon, afterwards, at the May term of said court, on the 10th day of October, 1890, the following proceedings were had in said case, as appears of record on page 61 of the journal of said court:

ALBERT H. GLASPELL
vs.
NORTHERN PACIFIC RAILROAD CO.

Comes now the plaintiff, by his attorney, S. L. Glaspell, Esq., and the defendant, by its attorneys, Messrs. Jno. S. Watson and W. F. Ball, and the plaintiff moves the court for judgement herein, and the defendant moves for a new trial. After hearing the arguments upon said motions the court takes the same under advisement.

Thereupon, afterwards, at the May term of said court, on the 3d day of November, 1890, the following proceedings were had in said case, as appears of record on page 81 of the journal of said court:

ALBERT H. GLASPELL, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The motion for a new trial having come on to be heard be-
49 fore this court, sitting at Fargo, in the southeastern division of this district, by consent of both parties, on the 8th day of October, A. D. 1890, and the court having heard S. L. Glaspell and E. W. Camp for the motion, and John C. Bullitt, Ball & Smith, and John S. Watkson in opposition, and being fully advised in the premises—

Now here orders and directs that the verdict and judgment heretofore rendered for the plaintiff and against the defendant in this action be, and the same are hereby, vacated and set aside, and that a new trial upon all the issues be, and the same is hereby, granted, with costs to abide the event of the action, and the plaintiff's motion for judgment herein is denied.

Thereupon, afterwards, to wit, on the said 3d day of November, 1890, the opinion of the court on the motion for a new trial was filed in said case; which said opinion is in words and figures following, to wit:

ALBERT H. GLASPELL
vs.
NORTHERN PACIFIC RAILROAD.

Circuit Court, District of North Dakota, November 3d, 1890. At Law.

On motion for a new trial.

This is an action brought to recover damages for deceit in the sale by the defendant to the plaintiff of 2,240 acres of land situate in the county of Wells, in this district. The action was tried in the territorial district court in and for Stutsman county, in the 6th judicial district, and a verdict and judgment were rendered for the plaintiff on the 26th day of November, 1888, for the sum of $12,609.58. A motion for a new trial was thereupon made by the

defendant in said territorial court; which motion was pending on the 2d day of November, 1889, when the State of North Dakota was admitted into the Union. A bill of exceptions was settled by the judge of the court who tried the cause on the 30th day of August, 1889. The property in controversy is situate within the said 6th judicial district as it existed under the territorial system, and all of the said district is included within the boundaries of the State of North Dakota. Upon the admission of the State into the Union this action was transferred from the territorial court into this court upon the request of the defendant, pursuant to section 23 of chapter 180, 25 Statutes at Large, page 676, and on the 8th day of October, 1890, the said motion for a new trial was brought on to be heard before this court.

50 The plaintiff alleges in his complaint, among other things, in substance, that on or about the 1st day of February, 1883, at Jamestown, in the county of Stutsman and Territory of Dakota, the defendant, The Northern Pacific Railroad Company, sold to this plaintiff, for a valuable consideration, to wit, the sum of $8,960, the lands in question, described as follows, to wit, the north one-half (N. ½) of section one (1), the south one-half (½) of section thirty-five (35), the south one-half (S. ½) of section fifteen (15), the north one-half (N. ½) of section thirty-one (31), and the north one-half of the southwest quarter (N. ½, S. W. ¼), and the north one-half of the south-ast quarter (N. ½, S. E. ¼) of section thirty-one (31), the southwest quarter of section three (3), all of said lands being in township one hundred and forty-five north, range sixty-nine (69) west, of the fifth principal meridian; also all of section twenty-three (23), in township one hundred and forty-five (145) north, range seventy (70) west, of the fifth principal meridian.

That said sale was made to plaintiff at Jamestown aforesaid, he then and there acting and being represented by S. L. Glaspell, a resident of the city of Jamestown, the plaintiff being a resident at that time of the city of Chicago; that at the time of the sale neither this plaintiff nor the said S. L. Glaspell had been wit-in the limits of said county of Wells, nor had seen nor had any knowledge of the situation, character, or quality of the lands except such as was imparted them by the defendant and its agents; that at the time the sale took place the lands were covered with snow to such an extent that no examination thereof could be made which would have disclosed their quality, and that the prairie in the vicin-ty of the lands was then impassable by reason of the deep snow, and that no railroad was then running trains within a distance of forty miles therefrom.

That for the purpose of inducing plaintiff to make the purchase of said lands, and prior to said purchase, defendant, through its agents, made certain representations to plaintiff as to the character, quality, and situation of said lands, the number of settlers in this vicinity, and as to its adpatability to general farming purposes, as follows: That all of said lands were adapted to general farming purposes; that the soil thereof consisted of black loam soil fr-m fifteen inches to two feet in depth, with clay subsoil; that it was

all free from stones, sand, and gravel, except a few scattering surface stones; that it was of gentle rolling surface and free from sloughs or water holes; that part of it contained some good
51 meadow land; that township 145, range 69, and township 145, range 70, in which said lands were situated, had been surveyed by the United States Government, and that the even-numbered sections thereon, known as Government lands, were thickly settled by actual settlers residing upon and cultivating their lands.

That, relying wholly upon said representations of defendant and its agents, and without having other knowledge of the character, quality, or situation of said lands, plaintiff purchased said lands of defendant in full faith and confidence in the truth of said representations so made to him; that the agents of the company who made said representations had authority to sell said lands and make said representations from the defendant; that said lands were not as represented to him; that they failed to correspond with the representations made to him, as hereinbefore set forth; that none of said lands were, at the date of the purchase and sale or at any time, adapted to general farming purposes or any purpose of farming; that the soil thereon did not then nor at any time consist of black loam surface soil from fifteen inches to two feet deep, with a clay subsoil, but, on the contrary, the black loam surface soil on said land nowhere exceeds a depth of six inches, and that but a small part of said land was or is covered with any black loam whatsoever; that said lands were not free from stones, sand, or gravel, but, on the contrary, are and were almost entirely composed of stones, sand, and gravel, both upon and under the surface, to such an extent as to make it unfit for any purpose of farming or agriculture, and the greater part of said lands were and are entirely unproductive of vegetation; that it was not and is not of gentle rolling surface and free from water holes and sloughs, but broken and hilly, and contain-g many sloughs and water holes; that township- 145, range 69, and 145, range 70, had not then been surveyed by the United States Government and are not yet so surveyed; that the even-numbered sections in said townships, known as Government lands, were not then and are not now thickly settled by actual settlers residing upon and cultivating their lands, but, on the contrary, the same are entirely uninhabited and uncultivated.

That said lands, at the time of the sale, had they been of the quality, character, and situation as represented aforesaid by the defendant, would have been of the actual cash value of $14,000, but the same were not then nor at any time were of any value whatever, but were and are entirely worthless, and the plaintiff has sustained damage by reason of such false representations afore-
52 said in the sum of $14,000, and demands judgment for that amount, with costs.

The defendant interposes a general denial.

Evidence was adduced on the parts of the plaintiff and defendant tending to prove the allegations in the complaint and answer.

The evidence on the part of the plaintiff tends to show that the

lands were of no actual value at the time of the sale, and that if they had been as represented they would have been worth from $5 to $7 an acre. On the part of the defendant one witness, John J. Nichols, claims to have examined the land described and says that it was probably worth about $3 an acre at the time of the sale. Another witness, Atkinson, on the part of the defendant testified that he had examined the land in the spring of 1882, and had made memoranda showing the character and quality of these lands in company with John J. Nichols. He testified, among other things, substantially as follows:

Q. When did you inspect or examine these lands?

A. In the spring of 1882.

Q. In company with any other person than yourself?

A. Mr. Nichols—John J. Nichols.

Q. And had you made any memoranda showing the character and quality of these lands as the result of that examination?

A. We did; yes, sir.

Q. You spoke of having made some selections for yoursolf from these townships?

A. I selected 16 sections for the company. There was Mr. Thompson, Mr. Burdick, Mr. Smith, Mr. Decker, Mr. De Saint, and Mr. Hench, all of Davenport, were interested with me in these. I had selected section 11, township 145, range 69, and half of section 1, township 145, range 69.

Q. Did you advise Mr. Glaspell during the course of any of these conversations that you had selected these lands from these townships?

A. I did; yes, sir; we were talking about them.

Q. Have you examined at any time the north half of section one in township 145, range 69?

A. Yes, sir; we did.

Q. State to the jury the character and quality of the soil upon that section, and its general contour and configuration.

A. It is bluffy, and i- is cut up; that is, the Pipestone; I can't say whether a branch of the Pipestone touches a corner of the section, but it lays on a bluff something like this bluff here,
53 north of the town. The south part of the section I purchased, but the north part was too bluffy to suit me.

Q. In any of the conversations which you had with Mr. Glaspell, about which you have testified, do you remember whether you said anything to him in regard to this coulee running through the north half of the section?

A. It wasn't a coulee; the north half of the section lies almost directly on the bluff, and the south half on the flat.

Q. Did you advise Mr. Glaspell of that?

A. I did.

Q. What reply did he make, if any, to the information you gave him of that?

A. I don't remember anything. I mentioned once that I thought that if the boom continued I might want to buy that, if it wasn't

bought, as I had the other half and as it was lying near Sykeston—if it wasn't taken up.

Q. Describe the south half of section 35, same township and range.

A. My remembrance is of that section that the surface is a good deal broken. The land, I think, is not hilly, but is broken as we found it over the prairie some places, especially near the coteaus or where we found the soil blown off. I think there was a good deal of such land as that, and there was parts that had the appearance of tough soil. Our examination was in April and we couldn't judge of the depth of the soil, but I judged that from the grass.

Q. South half of section fifteen.

A. I think that is better, but it is—I think there was a coulee running through that that I objected to.

Q. About the character and quality of the soil on this land.

A. The most of it I would judge from the growth of the grass to be very good. I would take the soil to be very good upon most of section 15. I remember particularly in the neighborhood there are——

Mr. NICKEUS: No; don't give us anything a-ound in the neighborhood.

Q. The north half of section 31 and the north half of the northeast quarter and north half of the southeast quarter of section 31, of the same township and range.

A. There was a part of that section, if I remember rightly, was very stony; I can't remember just what part it was; I think there was part of it, but I am not positive.

54 Q. Can you describe the character and the quality of the northwest quarter of section 3, of the same township and range?

A. I believe there is a coulee running up in that from the Pipestone. That is in 145, 69?

Q. Yes, sir.

A. I think there is a coulee running up—quite a rivine running up in that section that breaks it badly.

Q. Describe the character and quality of section 23, 145, 70.

A. That was a tolerably level section; but, if I remember right, from the gravel and grass I thought that the soil was thin on that, and I think there were a good many stones on it also.

Q. State a little more fully what experience you had in dealing in lands in this and adjoining counties, and what acquaintance you had with their value in the early part of the year 1883.

A. Well, I had been buying and selling some lands and had been farming to some extent and looking at lands considerable.

Q. What was the value of the lands per acre, concerning the character and quality of which you have just testified, in the month of February, 1883?

A. Well, I cannot put a valuation on them. Our lands in that neighborhood we were holding——

Mr. NICKEUS: Objected to as irrelevant, incompetent, and immaterial.

A. Well, I couldn't say just what such lands were worth.

Q. Supposing that all of said lands were adapted to general farming purposes; that the soil thereof consisted of black loam surface soil; that it was all free from stones, sand, and gravel, except a few scattering surface stones, and that it was gently rolling surface and free from sloughs and water holes, and that part of it contained some good meadow land—supposing all these things to have been true, what would have been its value per acre in the month of February, 1883?

A. I would call that pretty good land; such land as that would suit me. I would say that it was worth from six to seven dollars an acre, located there.

The land was principally paid for in preferred stock of the Northern Pacific Railroad Company.

John C. Bullitt, Ball & Smith, and John S. Watson, for defendant, cited—

Smith *v.* Bolles, 132 U. S., 135; Crater *v.* Binninger, 33 N. J. Law, 513; Horn *v.* Walton, 117 Ill., 130–141; Sungerland *v.* Bennett, 66 N. Y., 611; Schawber *v.* Ridell, 84 Ill., 517; Fitzsimmons *v.* Chapman, 37 Mich., 139; Tuckwell *v.* Lambert, 5 Cush., 23; sections 1967 and 1944 Dak. Civil Code; Edminster *et al. v.* Garrison, 18 Wis., 623; Kelly *v.* Pa. R. R. Co., 33 Fed., 856; Johnson *v.* 55 Allen, 5 S. E. Rep., 666; Thompson & Merriam on Juries, sec. 446; Hayne on New Trial, sec. 74; 59 Cal, 430; 19 Pac., 161–172; 4 Johns. N. Y., 487; Thompson on Trial, sec. 2623.

THOMAS, *J.:*

The bill of exceptions states that the court charged the jury, as to the measure of damages, that if they found for the plaintiff it must be in a sum equal to the difference between the actual value of the lands and the value of the said lands as they would have been had they been as represented at the time of the sale. The defendant excepted to this instruction and now contends that it is erroneous and was prejudicial to the defendant.

Did the court give to the jury the correct rule for the measurement of damages as applicable to the facts of this case?

The action is for the recovery on damages resulting to plaintiff from alleged false and fraudulent representations. The lands were wild and uncultivated, and at the time of the sale there were only a few settlers, if any, in the vicinity where this land was situated. In an action to recover damages which the plaintiff had suffered by reason of the purchase of stock in a corporation which he was induced to purchase on the faith of false and fraudulent representations made to him by the defendant, the Supreme Court of the United States in Smith *v.* Bolles, 132 U. S., 125, "held that the measure of damages is the loss which the plaintiff sustained by reason of such representations, such as the amount which he paid out and interest and all outlays legitimately attributable to the defendant's fraudulent conduct, but it does not include the expected fruits of an unrealized speculation." The rule thus enunciated by

the Supreme Court is binding on this court if applicable to the facts of this case.

Counsel for the plaintiff contends that the rule laid down in Smith *v.* Bolles, *supra*, applies only to the purchase of personal property of a speculative character, and that it does not apply to the purchase of land induced by fraud, and refers to Horn *v.* Walton (117 Ill., 130), which is one of the cases cited by Chief Justice Fuller, and in Smith *v.* Bolles, on page 130 of the opinion. In that case the supreme court of Illinois "states that where the sale of land is made by false and fraudulent representations as to its value, quality, or condition the measure of damages in any action by the purchaser is the difference between the actual value of the land and its value as represented to be at the time of the sale." But that question was not involved in the case and it was unnecessary to give the rule of damages on the sale of land induced by fraud. It appears in that case that the party procured a loan of $2,000 through fraud and deceit, upon representations that the security was good, the security being land, when, as a matter of fact, it was worthless. The court held that the actual loss to the party was the amount he had borrowed, with interest thereon, while he was kept out of the possession of it. The court say, on page 135 of the opinion: "We think the true measure of damages in this case was the amount of such loss, to wit, $2,000 and interest." In the opinion on Smith *v.* Bolles is cited also the case of Crater *v.* Binninger, 33 N. J. Law, 513, and it will be found in that case that the New Jersey court laid down an entirely different rule as to the measure of damages on the sale of lands induced by fraud. Courts hav- sometimes made a distinction as to the rule of damages in the sale of personal property and real property when effected or induced by fraud and false representations; but the Supreme Court of the United States, in Smith *v.* Bolles, seem to have laid down a rule applicable to the measure of damages in the sale of both classes of property coming within the line of facts applicable to that case.

56

Judge Shiras has applied this rule in the case of the sale of pine lands induced by false and fraudulent representations. Atwater *v.* Whiteman, 41 Fed., 427.

The statute of this State, section 1967, which was in force also in the Territory of Dakota at the time of the trial of this action and for a long time prior thereto, is declaratory of the common-law rule as to the measure of damages as enunciated, explained, and applied in Smith *v.* Bolles. It reads as follows: "For a breach of an obligation not arising from contract the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." The latter part of the section, "whether it could have been anticipated or not," is new; but as there is no question of remote damages in this case, it is not necessary to attempt to define the meaning of these words. The balance of the section, as I have stated, is declaratory of the common law. Faribanks *v.* Williams, 58 Cal., 241–242; 2 Greanl. Ev., section 256; Walruth *v.* Redfield, 11 Barb., 368–371.

Upon this statute and the cases of Smith *v.* Bolles and
57 Atwater *v.* Whiteman, *supra*, I am of the opin-on that the court, upon the trial of this action, should have instructed the jury that if they found for the plaintiff upon the other issues, that as to the measure of damages they should find the cash value of the land in the condition it actually was at the time of the sale and deduct such value from the sum of money invested by the plaintiff in the land, and that difference, with interest added in the discretion of the jury, would be the proper amount which the plaintiff was entitled to recover.

It follows that the instructions given by the court as to the measure of damages *was* erroneous, for which error a new trial must be granted unless it appears that the error was harmless and worked no injury to the defendant.

It is apparent that the case was tried by both parties upon the theory that the rule for the measure of damages as given by the court was the correct rule, and it must be presumed that the jury followed the instructions of the court and applied the rule given in making up and returning their verdict. The jury were the judges of the credibility of the witnesses and of the weight of the evidence. They were instructed, in fact, that if they found for the plaintiff they should find the actual value of the property at the time of the sale, and also that they should find what the value would have been if it had been as represented, and the difference would be the correct measure of damages. The evidence tended to show on the part of the plaintiff that the lands were of no value whatever, but that they would have been worth from $5 to $7 per acre if they had been as represented. The evidence on the part of the defendant given by the witness Atkinson was to the effect that they were of some value; or, in other words, the jury were at liberty to find from his evidence that the lands were of some value. The witness Nichols testified that they were worth about $3 an acre.

Can this court determine from the evidence or from the record whether the jury adopted the evidence of the defendant's witnesses as to the actual value at the time of the sale, or whether they adopted the theory of the plaintiff's witnesses that they were of no value whatever?

Can the court legitimately find from the evidence or from the record sent to this court whether the jury adopted the theory of defendant's witnesses and placed the actual value of these lands
58 at $3 per acre at the time of the sale, and adopted the theory of plaintiff's witnesses that they would have been worth $7 per acre if they had been as represented, that being the highest sum placed by plaintiff's witnesses upon said lands if they had been as represented, and allowed the plaintiff the difference of $4 per acre and interest thereon, or whether the jury adopted the theory that the lands were of no value at the time of the sale and found that they would have been worth $4 per acre if they had been as represented, the consideration paid, a sum lower than any of plaintiff's witnesses had placed on the land, and added interest to this sum of $4 per acre? The result or the amount of the verdict would have

been the same in either case. I think it clear that this court cannot determine that question from the evidence or the record now before it. It must go outside of the record, if at all, to determine on what basis the jury figured or what rule or calcul- they resorted to in determining their verdict. It would seem that the jury would reasonably infer from the comprehension of all t-e evidence that the lands at the time of the sale were of some value. It is notorious that the lands of the Northern Pacific Railroad Company were sought after and were readily sold in the market at and prior to that time at reasonable prices.

It is possible, also, that if the case had been tried upon the correct theory as to the measure of damages the value of the preferred stock, with which the lands in question were principally paid for, might have been a subject of inquiry on the trial, or may upon a new trial be inquired into for the purpose of ascertaining the loss sustained by the plaintiff. It is impossible for this court to say, from all the evidence, that a verdict upon a new trial will be the same or substantially the s-me. In Atwater *v.* Whiteman, *supra*, the court sustained the verdict and refused to grant a new trial, notwithstanding the jury had been erroneously instructed as to the measure of damages, for the reason that a special verdict, in addition to the general cerdict, had been found by the jury. On page 428 of the opiniou Judge Shiras says: "The general verdict was as follows: 'We, the jury, find a verdict for the plaintiff for $4,924.62, with interest at the rate of 7% from November 15, 1882, to January 7, 1890, amounting to $2,417.90, which added to the last-named amount makes a total of $7,342.50.' In answer to specific questions submitted, the jury found that the fair cash value of the land at the time of the
59 sale was $1.25 per acre, and that if the land had at the time of the sale been equal in quality and value t- what defendant represented it to be, the value thereo- would have been $11,598.13. The undisputed evidence shows that there was invested in the land the sum of $6,964 belonging to the plaintiff. Deduct from this amount the value of the land at the rate of $1.25 per acre, as found by the jury, and we get the exact sum found by the jury in the general verdict in the amount of damages, to wit, $4,924.62. It is therefore clear, beyond question, that the jury in estimating the damages in fact carried out the rule laid down in Smith *v.* Bolles."

There are no facts on the face of the record presented to this court in the case at bar that would enable it to say that the jury in estimating the damages in effect carried out the rule laid down in Smith *v.* Bolles or reached substantially the same result they might have reached if that rule had been given to them by the court.

The plaintiff claims that there was no prejudicial error in the giving of the instruction, for the reason that the jury in fact only allowed the purchase-money and interest, and that affidavits of jurors are admissable to show this fact to sustain the verdict, and in support of his contention therein produced and read upon the hearing of the motion for a new trial in this court the following affidavits, signed by eight of the jurors:

STATE OF NORTH DAKOTA, }
County of Stutsman. }

M. W. Wright, P. V. Fellows, J. H. Sears, and Joseph Stine, being each duly sworn, deposes and says, each for himself, that he was one of the jurors in the trial of the above-entitled action, in which a verdict was rendered in the district court of the Territory of Dakota, in the county of Stutsman, on the 24th day of November, A. D. 1888, and in arriving at said verdict the jury estimated the land sold by defendant to plaintiff to be of no value, and that plaintiff paid therefore the sum of $8,960, or $4 per acre, for 2,240 acres. The sale was made on or about March 6th, 1883. We considered that the land would have been worth, if it had been as represented, the sum of $4 per acre, and that plaintiff had lost by the transact- on the price he paid, with interest. It was the intention or aim of the jury to render a verdict for the plaintiff equal to the amount of money which he had paid to defendant, with interest at 7% per annum.

(Signed) ——— ———.

60 STATE OF NORTH DAKOTA, } *ss:*
County of Stutsman, }

William Harselew, R. M. Clayton, A. M. Davis, and Charles Riemenschneider, being first duly sworn, each for himself deposes and says that he was one of the jurors in the trial of the above-entitled action in the district court of the then Territory of Dakota, county of Stutsman, in which a verdict was rendered on the 24th day of November, A. D. 1888. In reaching such verdict the jury estimated the land sold plaintiff by defendant to be worthless and of no value, and that plaintiff paid therefore the sum of $8,960 on or about March 6th, 1883. We considered that if the land had been as represented that it would have been of the value of $8,960, and th-t plaintiff had lost by reason of the transaction the sum paid, with interest at seven per cent. per annum.

(Signed) ——— ———.

And in support of these affidavits of the jurors they also read the following affidavits:

STATE OF NORTH DAKOTA, } *ss:*
County of Stutsman, }

Theodore F. Branch, being first duly sworn, deposes and says that he is the clerk of the district court for Stutsman county, North Dakota; that at the November, 1888, term he was a bailiff in said court, and was present in said court during the trial of the case of Albert H. Glaspell *vs.* Northern Pacific Railroad Company, and was one of the witnesses in said action, and testified in regard to a survey and examination of the lands (2,240 acres) involved in said action made by himself; that he was the bailiff in charge of the jury in said action during their deliberations over their verdict; that said jury returned a sealed verdict into court about eleven (11) o'clock p. m.; that immediately after said jury left the jury-room this affiant found

therein a paper upon which a calculation of interest had been made upon a principal sum of $8,960, amounting in all to $12,545.43, being the amount of the verdict in said action; that at the same time this affiant returned with said paper into the court-room and made the statement to S. L. Glaspell and E. W. Camp that he could tell what the verdict would be. Affiant found said paper on the table used by said jury in arriving at their verdict, and
61 there was no other paper in said room with figures thereon or calculations of any kind.

(Signed) ——— ———.

STATE OF NORTH DAKOTA, } ss:
County of Stutsman, }

Edgar W. Camp, being first duly sworn, says he was one of the attorneys for plaintiff in the action mentioned in the foregoing affidavit of Theodore F. Branch. Affiant, with others, waited in the court-room until after the jury agreed and returned a sealed verdict. After the verdict had been agreed upon and the jury had left the jury-room, said Branch went into the jury-room and soon after returned to the court-room holding in his ha-d a piece of paper, which he seemed to be examining. Branch said that he would like to make a bet that he could guess within five dollars of the amount of the verdict. To the best of affiant's recollection affiant soon after saw the said paper and examined it, and that it contained a calculation of interest. Affiant does not recollect the sums and amounts, but recollects that the verdict read the next day tallied with the calculation on the paper.

(Signed) ——— ———.

STATE OF NORTH DAKOTA, } ss:
County of Stutsman, }

S. L. Glaspell, being first duly sworn, says that he was one of the attorneys for the plaintiff in the trial of the above-entitled action; that he saw the paper referred to in the above affidavit within five minutes *off* the time the said jury left the jury-room and returned their verdict, sealed, to the clerk; that he immediately telegraphed the plaintiff, who had previously left the city, the verdict, and based the sum upon the figures in said paper, and he had no other knowledge or information of the verdict than was disclosed by said paper. The same contained a calculation of interest *in* the sum of $8,960 at 7% interest to the date of the verdict. The figures telegraphed by affiant as the verdict in said case was the exact amount as afterwards shown by the verdict when opened in court. Affiant had no conversation with any juror prior to the opening of said verdict in court as to the amount thereof, and had no knowledge or information of the amount thereof save as was disclosed by said paper.

(Signed) ——— ———.

62 These affidavits were read subject to the objection of the defendant.

Are these affidavits admissable for the purpose claimed? The material part of the affidavit of Branch is that "said jury returned the verdict into court about eleven o'clock p. m.; that immediately after said jury left the jury-room this affiant found therein a paper upon which a calculation for interest had been made upon a principal sum of $8,960, amounting in all to $12,545.43, being the amount of the verdict in said action," and that he communicated these facts to Camp and Glaspell; "that affiant found said paper on the table used by said jury in arriving at their verdict, and there was no other paper in said room with figures thereon or calculations of any kind." The effect of the affidavits of Camp and Glaspell is that they saw the paper immediately after as shown to them by Branch. Giving full effect to these affidavits, the most they show is that the jury figured from a principal sum of $8,960, at 7% interest, and reached the sum of $12,545.43, being the amount of the verdict. If the jury had found the actual value of the land to be $3 per acre and the value as represented at $7 per acre, the same result would follow as above suggested. We must, therefore, go to these affidavits of the jurors to sustain this verdict, if at all. Are these affidavits of jurors admissable to show on what grounds or by what process of reasoning the jury found and rendered their verdict? Can the plaintiff show by these affidavits that the jury disregarded the instructions of the court and the theory on which the case was tried in respect to the measure of damages, and that they adopted the correct rule and gave the verdict for the loss the plaintiff had sustained by reason of the fraud? This is the proposition presented, and I have been unable to find any well-considered authority to sustain it. Upon the grounds of public policy the courts have almost universally agreed upon a rule that no affidavit, deposition, or sworn statement of a juror shall be received to impeach the verdict, or to explain it or to show on what grounds it was rendered.

Thompson & Merriam on Juries, section 440, and cases there cited; Hudson *v.* State, 9 Yerg. (Tenn.), 408; Larkin *v.* Tartar, 3 Sned., 681; T. & M. on Juries, section 451; Thompson on Trials, sec. 2627, and cases cited. It has been held in Massachusetts that when a jury have returned into court with their verdict, before they are discharged and while they are yet a jury, it is competent for
63 the court to interrogate them as to the grounds of their finding if there is more than one distinct ground on which the verdict may be given. Parrot *vs.* Thatch., 9 Pick., 426; Briggs *v.* Barry, 2 Curt. C. C., 259. I apprehend that these courts would not extend the rule so as to admit the affidavits of jurors as to the grounds on which the verdict was rendered, even if all the jurors had made and joined in the affidavits, especially after they had separated and ceased to become a jury in the case.

In Roberts *v.* Hughes, 7 Mees & W., 398, the English court of exchequer held that the rule does not exclude jurymen from swearing to what took place in open court, but only to what took place in their private room or as to the grounds on which they found their

verdict. While the testimony of the jurors will not be received to impeach their verdict, it will be received to sustain the verdict when assailed. This rule is invoked generally and almost universally when the verdict is assa-led on account of alleged misconduct of jurors, and it is not only adopted in the furtherance of justice, but to vindicate the jurors themselves. Thompson & Merriam on Juries, section 446; Wright *v.* Illinois, etc., Tel. Co., 220 Ia., 195; Hall *v.* Robinson, 25 Iowa, 91; Profat on Jury Trial, sec. 408, and cases cited; People *v.* Hunt, 59 Cal., 430–432; People *v.* Goldenson, 19 Pac., 172.

The case of Dalrymple *v.* Williams *et al.*, 63 N. Y., 361, and Hodgkins *v.* Mead, 23 N. E. Rep., N. Y., 559, are relied on by plaintiff to support his contention that the affidavits of the jurors are admissable to sustain the verdict; but in both of these cases the facts are materially different from the case at bar. In Dalrymple *v.* Williams *et al.* the foreman announces as the verdict of the jury a general verdict against both defendants. It was claimed that the real verdict, as agreed upon, was in favor of Williams and against other defendant, and the affidavits of the jurors stating these facts and the fact that the foreman had made a mistake in announcing the verdict in court were admitted. The affidavits were admitted simply to correct a mistake made in open court and not to explain or give the grounds on which the verdict was based. On page 365 of the opinion Mr. Justice Allen, speaking for the court, refers to Jackson *v.* Dickinson (15 J. R., 309), and to Roberts *v.* Hughes, 7 M. & W., 399, *supra*, with approval. He says: "In Jackson *v.* Dickinson the affidavits of the jurors were held admissable to show that a mistake had
64 been made in taking their verdict, and that it was entirely different from what was intended. The court draws a distinction between what transpires while the jury are deliberating on their verdict and what takes place in open court in returning their verdict, holding the statements of jurors admissable as to the latter, but not as to the former. Roberts *v.* Hughes, 7 M. & W., 399, is like the last case quoted. The affidavits of the jurors were received as to what took place in open court on the delivery of the verdict to correct it."

In Hodgkins *v.* Mead, *supra*, which was an action brought by a real-estate broker for commissions, the defendant contended that the payment of commissions was conditional on the completion of the contract by the purchasers, but no question was made as to the amount. On page 559 of the opinion, Justice Peckham, speaking for the court, says: "The answer set up a special contract between the parties, by which the plaintiff was to claim and be entitled to no commissions except upon the performance by the proposed purchasers of the property of the special contract of sale entered into between them and the defendant, and the answer alleged a failure by the proposed purchasers, and that on account thereof the plaintiff had not earned his commissions. This was the sole question at issue between the parties, and it was assumed and conceded that if the plaintiff was entitled to a verdict at all it was for the 1 % upon $80,000, with interest from the time it was due. The charge of the

judge to the jury was explicit upon that point, and he stated in so many words that if the plaintiff was entitled to a verdict he must recover his commissions upon the purchase price, with interest, amounting in all to the sum of $848. The judge further said: "Now, you have a single question of fact to decide—whether you believe the testimony of the plaintiff or the testimony of Mead, Sargeant, and Meldrum as to this arrangement made on the 21 day of February. If you find that there was an arrange-ent made that the commission of plaintiff was conditional, then your verdict will be for the defendant, because the condition was never complied with. If, on the other ha-d, there was no condition, it is admitted here that the plaintiff was employed, and that he found a purchaser, and that the plaintiff would be entitled to a verdict." The precise amount of such verdict had already been stated by the court and there was no dispute about it.

It was conceded that the amount of the verdict, if for the plaintiff, must be 1 % upon the $80,000, with interest. It was clear beyond dispute that the amount must be the same upon another trial. The amount was really agreed upon, but the foreman
65 neglected to hand the amount to the court in the sealed verdict. The case was decided on the principal enunciated in the case of Dalrymple *v.* Williams *et al.*, *supra*. The affidavits were admissable to correct a mistake made in open court in not announcing the actual verdict agreed upon by the jury on the principal laid down in Jackson *v.* Dickinson and Roberts *v.* Hughes, *supra*. It was upon this principal that the court allowed the verdict to be amended in Burlingham *v.* Cent. R. of Minn., 23 Fed., 706.

In my opinion the affidavits of all the jurors would not have been admissable to sustain this verdict, much less the affidavits of eight jurors, who attempted to speak for the entire jury. The objection of the defendant to the admissibility of the affidavits is therefore sustained. It is claimed by the attorney for the plaintiff that it was admitted upon the argument in this court that the land was worthless, and, that being so, it necessarily follows that the jury must have adopted that theory. I do not understand that defendant's attorney made so broad an admission, but if he did it does not follow that the jury adopted that theory as the basis of their calculations in view of the evidence.

It follows that, for the reasons hereinbefore stated, a new trial must be granted, and it is accordingly ordered. It is unnecessary to notice the other assignments of error.

Upon the back of said opinion appear endorsements in words and figures following, to wit:

Original. 8. United States circuit court, district of North Dakota. Albert H. Glaspell *vs.* Northern Pacific Railroad Company. Opinion of the court on motion for new trial. Filed Nov. 3, 1890. J. A. Montgomery, clerk.

Thereupon, afterwards, at the May term of said court, on the 22d day of November, 1890, the following proceedings were had in said case, as appears of record on page 93 of the journal of said court:

ALBERT H. GLASPELL, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The motion for a new trial herein having come on to be heard before this court, sitting at Fargo, in the southeastern division of this district, by the consent of both parties (plaintiff not waiving his objection to the jurisdiction of the court, however), on the 8th day of October, A. D. 1890, and the court, having heard John
66 C. Bullitt, Ball & Smith, and John S. Watson for the motion and S. L. Glaspell and E. W. Camp in opposition, and being fully advised in the premises, now here orders and directs that the verdict and judgment heretofore rendered for the plaintiff and against the defendant in this action in the territorial court be, and the same are hereby, vacated and set aside, and that a new trial upon all the issues be, and the same is hereby, granted, with the costs to abide the event of the action.

To which order the plaintiff duly excepts.

The order of November 3d, 1890, heretofore made, now appearing upon the minutes of this court, is revoked for errors appearing upon its face, and this order is substituted in its stead and place.

Let a certified copy of this order be filed with the papers in the case in the office of the clerk of the court in the southwestern division of this district.

Thereupon, afterwards, to wit, on the 7th day of April, 1891, a stipulation was filed in said case; which said stipulation is in words and figures following, to wit:

In the Circuit Court of the United States, District of North Dakota, Southwestern Division.

ALBERT H. GLASPELL, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Stipulation Removing Cause.

It is agreed by and between the parties hereto that this action and the records, files, and papers therein may be removed and transferred to the southeastern division, and all further proceedings had therein, the plaintiff not waiving his objection to the jurisdiction of the court.

S. L. GLASPELL,
Att'y for Plaintiff.
JOHN S. WATSON,
Att'y for Def't.

67 In the Circuit Court of the United States, District of North Dakota.

ALBERT H. GLASPELL, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Stipulation.

It is agreed by the parties hereto that the above-entitled cause may be tried at the May, 1891, term of this court, to be held in the southeastern division, at Fargo, plaintiff not waiving his objection to the jurisdiction of the cou

Dated April 2d, 1891.

S. L. GLASPELL,
Attorney for Plaintiff.
JNO. S. WATSON,
Att'y for Defendant.

The court is respectfully requested to set the trial of this action for May 20th, 1891, at Fargo, N. D.

S. L. GLASPELL,
Pl'ff's Att'y.
JNO. S. WATSON,
Def't's Att'y.

Upon the back of said stipulations appear endorsements in words and figures following, to wit:

Albert H. Glasspell *vs.* N. P. R. R. Co. Stipulation removing cause to S. E. division. Filed April 7, 1891. J. A. Montgomery, clerk, by Edward S. Allen, deputy.

Thereupon, afterwards, at the May term of said court, on the 30th day of May, 1891, the following proceedings were had in said case, as appears of record on page 140 of the journal of said court:

ALBERT H. GLASPELL,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY. (29.)

Now comes the jury and by their foreman, in their presence, do render the following verdict:

"ALBERT H. GLASPELL
vs.
THE NORTHERN PACIFIC RAILROAD CO. *ss:*

68 We, the jury, find for the plaintiff the sum of eleven hundred and twenty dollars ($1,120.00).

Fargo, N. D., May 30th, 1891.

W. H. ROBINSON, *Foreman.*"

Which verdict is then and there duly entered by the clerk, and the jury discharged from further consideration of this case.

Thereupon, afterwards, at the May term of said court, on the 1st day of June, A. D. 1891, the following proceedings were had in said case, as appears of record on page 141 of the journal of said court:

ALBERT H. GLASPELL
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY. } 29.

The jury in this action having found a verdict for the plaintiff and against the defendant in the sum of $1,120.00, it is now ordered and considered adjudged that the plaintiff, Albert H. Glaspell, do have and recover of and from said defendant, The Northern Pacific Railroad Company, the sum of eleven hundred and twenty (1,120.00) dollars, with $249.95 as costs and disbursements herein, and that plaintiff have execution therefore.

On motion of the defendant, it is ordered that execution be staid for thirty days upon the judgment herein.

Thereupon, afterwards, to wit, on the 16th day of June, A. D. 1891, a writ of error was allowed in said case and the citation issued thereon, and an assignment of error and a prayer for reversal were filed in said case; of which said writ of error and citation, assignment of error, and prayer for reversal the following are the originals:

69 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the circuit court of the United States for the district of North Dakota, southeastern division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Albert H. Glaspell, plaintiff, and the Northern Pacific Railroad Company, a manifest error hath happened, to the great damage of the said plaintiff, Albert H. Glaspell, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the question of the removal of said cause from the district court of the State of North Dakota to the said circuit court of the United States for the district of North Dakota, and concerning the jurisdiction of the said circuit court to hear and determine said cause, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the fifteenth day of August next, in the said Supreme Court to be then and there held, that,

the record and proceedings aforesaid being inspected, the said
70 Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 16th day of June, A. D. 1891.

[Seal Circuit Court of the United States, District of North Dakota.]

J. A. MONTGOMERY,
Clerk of the Circuit Court of the United States for the District of North Dakota, Southeastern Division.

UNITED STATES OF AMERICA, }
District of North Dakota, Southeastern Division, } *ss:*

The answer of the judges of the circuit court of the United States for the district of North Dakota, in the eight circuit, in the above writ mentioned.

The record and proceedings whereof mention is above made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States of America within mentioned in a certain schedule to this writ annexed, as above it is commanded.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 28th day of July, A. D. 1891.

Seal Circuit Court of the United States, District of North Dakota.

Issued at my office, in the city of Fargo, under the seal of said circuit court, the day and year least aforesaid.

J. A. MONTGOMERY, *Clerk.*

70½ [Endorsed:] Dist. of North Dakota, southeastern division. Albert H. Glaspell *v.* Northern Pacific Railroad Co. Writ of error. Filed Jun- 16, 1891. J. A. Montgomery, clerk, by ——, deputy.

71 The United States of America to Northern Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 15th day of August, anno Domini eighteen hundred and ninety-one, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of North Dakota, southeastern division, wherein Albert H. Glaspell is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered for the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States Supreme Court, this 16th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

ALFRED O. THOMAS,
District Judge.

Service of the above citation by copy is admitted at Fargo, North Dakota, this 16th day of June, A. D. 1891.

W. F. BALL &
JNO. S. WATSON,
Attorneys for Defendant.

71½ [Endorsed:] Dist. of North Dakota, southeastern division. Albert H. Glaspell *v.* Northern Pacific Railroad Co. Citation. Filed Jun- 16, 1891. J. A. Montgomery, clerk, by —— ——, deputy.

72 In the Supreme Court of the United States, October Term, A. D. 1891.

ALBERT H. GLASPELL, Plaintiff in Error,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant in Error.

Assignment of Error.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, D. C., comes the said Albert H. Glaspell, by Edgar W. Camp and Samuel L. Glaspell, his attorneys, and says that in the records and proceedings aforesaid there is manifest error, in this, to wit:

I.

First. The court erred in making its order on the 11th day of July, A. D. 1890, that this action is one of which this court is the successor of the territorial court, and ordering the issuance of a writ of certiorari, directed to the territorial court, commanding and requiring said clerk to transmit to this court, at Bismarck,
73 all files, records, and proceedings of said cause.

II.

Second. The court erred in overruling in its order of July 11th, A. D. 1890, the motion of the plaintiff in error, made to discharge the order made by the court directing the district court of the State of North Dakota for the county of Stutsman to transfer or cause to be transferred to the circuit court of the United States for the district of North Dakota the files, records, and proceedings in said cause or show cause why he has not done so.

III.

Third. The court erred in overruling the motion made by plaintiff in error to remand this cause on the 8th day of October, A. D. 1890, and in retaining jurisdiction over his objection.

IV.

Fourth. The court erred in vacating and setting aside the judgment rendered in the territorial court, to wit, in the county of Stutsman and Territory of Dakota, on the 26th day of November, A. D. 1888, in favor of the plaintiff in error and against the de-
74 fendant in error, and granting a new trial upon all the issues in this case.

V.

The court erred in assuming jurisdiction in the trial of this action and in all proceedings in the circuit court of the United States for the district of North Dakota, and erred in rendering judgment herein.

EDGAR W. CAMP,
S. L. GLASPELL,
Attorneys for Plaintiff in Error.

74½ [Endorsed:] Albert H. Glaspell, plaintiff in error, *vs.* Northern Pacific Railroad Co., defendant in error. Assignment of error. Filed Jun- 16, 1891. J. A. Montgomery, clerk, by —— ——, deputy.

75 In the Supreme Court of the United States, October Term, A. D. 1891.

ALBERT H. GLASPELL, Plaintiff in Error,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant in Error.

Prayer for Reversal.

And the said Albert H. Glaspell, plaintiff in error, prays that the judgment and all proceedings herein be reversed and annulled and the cause remanded to the district court of the county of Stutsman and State of North Dakota, and that he may be restored to all things which he has lost by occasion of said judgment.

EDGAR W. CAMP,
SAMUEL L. GLASPELL,
Attorneys for Plaintiff in Error.

75½ [Endorsed:] 30. U. S. circuit court, district of N. Dakota. Albert H. Glaspell *vs.* N. P. R. R. Co. Prayer for reversal. Filed Jun- 16, 1891. J. A. Montgomery, clerk, by —— ——, deputy.

76 Whereupon, afterwards, to wit, on the 16th day of June, A. D. 1891, a supersedias bond was filed in said case; which supersedeas bond is in words and figures following, to wit:

Know all men by these presents that we, Albert H. Glaspell, as principal, and George Lutz and G. A. Lieber, as sureties, are held and firmly bound unto the Northern Pacific Railroad Company, its successors or assigns, in the sum of five hundred dollars, to be paid to the said Northern Pacific Railroad Company; for the payment of

which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this June 16th, 1891.

Wherefore lately, at a session of the circuit court of the United States for the district of North Dakota, in a suit depending in said court between Albert H. Glaspell, as plaintiff, and the said Northern Pacific Railroad Company, as defendant, a final judgment was on the 1st day of June, A. D. 1891, rendered in favor of the said Albert H. Glaspell and against the said Northern Pacific Railroad Company for the sum of eleven hundred and twenty dollars, with interest and costs to be added; and the said Albert H. Glaspell having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and all orders and proceedings had therein, and a citation directed to the Northern Pacific Railroad Company, citing and admonishing it to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next, having been duly served and filed:

Now, the condition of the above obligation is such that if the said Albert H. Glaspell shall prosecute said writ of error to effect and answer for all costs if said Albert H. Glaspell fail to make his plea good, then the above obligation is to be void; otherwise the same shall be and remain in full force and virtue.

In witness whereof said Albert H. Glaspell and George Lutz and G. A. Lieber have duly affixed their names and seals hereto the day and year first above written.

ALBERT H. GLASPELL,
By S. L. GLASPELL, [SEAL.]
His Attorney.
GEORGE LUTZ. [SEAL.]
G. A. LIEBER. [SEAL.]

77 STATE OF NORTH DAKOTA, } ss:
County of Stutsman, }

George Lutz and G. A. Lieber, being duly and severally sworn, each for himself deposes and says that he acknowledges the signing and execution of the foregoing bond as his own free and voluntary act; that he is worth the full sum of five hundred dollars over and above all his debts and liabilities and exclusive of all property by law exempt from execution.

GEORGE LUTZ.
G. A. LIEBER.

Subscribed and sworn to before me this 16th day of June, A. D. 1891.

WILLIAM B. GRIMBLE,
Notary Public.

The foregoing bond and sureties are approved this — day of June, A. D. 1891.

ALFRED D. THOMAS, *Judge.*

Upon the back of said supersedias bond appear endorsements in words and figures following, to wit:

30. Circuit court U. S., district of North Dakota, southeastern div. Albert H. Glaspell *vs.* Northern Pacific Railroad Co. Bond. Filed June 16, 1891. J. A. Montgomery, clerk.

UNITED STATES OF AMERICA, *District of North Dakota,* } ss:

By virtue of the foregoing writ of error and in obedience thereto I, J. A. Montgomery, clerk of the circuit court of the United States for the district of North Dakota, in the eighth circuit, do hereby certify that the foregoing pages, from one to seventy-seven, contain true and faithful transcripts of the pleadings and proceedings of record and on file in my office as said clerk to this date in the case of Albert H. Glaspell *vs.* The Northern Pacific Railroad Company, and that a copy of the writ of error and citation has been lodged and remains on file in my said office.

Witness my hand and the seal of said court, at Fargo, this 27th day of July, A. D. 1891.

[Seal Circuit Court of the United States, District of North Dakota.]

J. A. MONTGOMERY, *Clerk.*

Endorsed on cover: North Dakota C. C. U. S. No. 1330. Albert H. Glaspell, plaintiff in error, *vs.* The Northern Pacific Railroad Company. Filed August 13, 1891.

Office Supreme Court U. S.
FILED.
MAR 7 1892
JAMES H. McKENNEY,
CLERK.

No. 1330.

Supreme Court of the United States.

OCTOBER TERM, 1891.

ALBERT H. GLASPELL,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILROAD COMPANY,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

Brief for Plaintiff in Error.

EDGAR W. CAMP,
SAMUEL L. GLASPELL,
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NORTH DAKOTA CAPITAL PRINT.

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STATEMENT OF THE CASE.

The question is, had the Circuit Court of the United States for the district of North Dakota jurisdiction in this action under Sec. 23 of the act of February 22d, 1889, admitting North Dakota, South Dakota, Montana and Washington into the Union as states; (25 St. U. S., 683), the cause having been tried, a verdict and judgment rendered by the district court of Dakota Territory from which no appeal had

been taken; and had the circuit court power to compel the removal of the cause by *certiorari*, the state court having denied its jurisdiction and refused to transfer the files, records and proceedings?

The section referred to is as follows:

SECTION 23. That in respect to all cases, proceedings, and matters now pending in the supreme or district courts of either of the territories mentioned in this act at the time of the admission of either of the states mentioned in this act, and arising within the limits of any such state, whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States, had such courts existed at the time of the commencement of such cases, the said circuit and district courts respectively shall be the successors of said supreme and district courts of said territory; and in respect to all other cases, proceedings and matters pending in the supreme or district courts of any of the territories mentioned in this act at the time of the admission of such teritory into the Union, arising within the limits of said proposed state, the courts established by such state shall, respectively, be the successors of said supreme and district territorial courts; and all the files, records, indictments and proceedings relating to any such cases, shall be transferred to such circuit, district and state courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause or proceeding now pending, or that prior to the admission of any of the states mentioned in this act shall be pending in any territorial court in any of the territories mentioned in this act, shall abate by the admission of any such state into the Union, but the same shall be transferred and proceeded with in the proper United States circuit, district or state court as the case may be; *provided however*, that in all civil actions, causes and proceedings in which the United States is not a party, transfers shall not be made to the circuit and district courts of the United States, except upon written request of one of the parties to such action or proceedings filed in the proper court, and in the absence of such request such cases shall be proceeded with in the proper state courts.

This action, brought for deceit in the sale of lands, 8
plaintiff claiming $14,000 damages, was commenced February 24th, 1885, was tried to a jury before Roderick Rose, judge, at the November, 1888, term of the district court for the county of Stutsman, Territory of Dakota. A verdict was rendered for plaintiff November 24th, 1888, and judgment thereon entered November 26th, 1888, for $12,609.58 damages and costs, from which no appeal has been taken. On November 28th, 1888, the judge made an order extending the time for serving notice of intention to move
for a new trial, for serving a motion for a new trial 9
and for the settlement of a bill of exceptions until January 28th, 1889. Five other similar orders were made extending the time for the same purposes; the last one, made May 23d, 1889, was as follows: "The date for settling the bill of exceptions proposed by the defendant herein is hereby extended to June 29th, 1889. Defendant may have until ten days after the settling of said bill within which to serve notice of intention to move for a new trial and within which to move for a new trial." (record pp. 22 to 25). A
proposed bill of exceptions was prepared and served 10
March 15th, 1889; was signed and settled as proposed August 30th, 1889, and filed in the office of the clerk September 3d, 1889.

A notice of intention to move for a new trial and a motion for a new trial was served by defendant on plaintiff's attorneys with notice that the motion would be presented to the court September 12th, 1889.

On the margin thereof there appears the fol- 11
lowing:

"Hearing continued until the 21st Sept., 1889."
RODERICK ROSE, Judge."
(record p. 26.)

The motion for a new trial was not submitted to the territorial court for decision and it was not by that court considered or decided. It remained in the possession of defendant's attorneys until it was filed after the admission of the state, and a week after defendant's application for removal.

12 On November 2d, 1889, North Dakota became a state. On December 7th, 1889, defendant filed in the state court, its petition and bond to remove the cause to the circuit court of the United States for the district of North Dakota, based on the ground that defendant was a federal corporation. (record p. 2).

The judge of the district court for the county of Stutsman and state of North Dakota, (being the judge who tried the cause), to which court such petition was addressed and which had the files, records
13 and proceedings thereof, denied such request for a removal.

On March 31st, 1890, an alternative writ of *certiorari* was issued by the circuit court of the United States for the district of North Dakota to said state court commanding it to transfer the files, records and proceedings in said action, or to show cause why the same was not done.
(record p. 5).

14 Return to said writ was made (record p. 7), and motion made to discharge the same, because the court had not jurisdiction of the action or to make or enforce such order. (record p. 10). Plaintiff's objections were overruled, (record p. 11), and a writ of *certiorari* issued, (record p. 12). In obedience thereto, the clerk of the state court transmitted the files, records and proceedings of this cause to the circuit court.

15 August 22d, 1890, plaintiff moved to remand the cause for want of jurisdiction, which motion was denied, (record p. 39).

October 8th, 1890, the motion for a new trial heretofore referred to, was brought to a hearing, was granted, and a new trial ordered, the plaintiff at every step objecting to the jurisdiction of the court.

On May 30th, 1891, the cause having been again tried on the same issues and pleadings, in the circuit court, a verdict and judgment for $1,120 and $249.95 costs were rendered in favor of plaintiff.

SPECIFICATION OF ERRORS.

16

First. The court erred in making it's order on the 11th day of July A. D. 1890; that this action is one of which it is the successor of the territorial court, and ordering the issuance of a writ of *certiorari*, directed to the clerk of the state court, commanding and requiring said clerk to transmit to the circuit court all the files, records and proceedings of this cause.

Second. The court erred in overruling motion of 17
the plaintiff in error, made to discharge the order directing the judge of the district court of the State of North Dakota, for the county of Stutsman to transfer, or cause to be transferred, to the circuit court of the United States for the district of North Dakota the files, records and proceedings or show cause why he had not done so.

Third. The court erred in overruling the motion made by plaintiff in error to remand this cause to the state court. 18

Fourth. The court erred in vacating and setting aside the judgment rendered in the territorial court in favor of plaintiff in error and in granting a new trial in the circuit court.

Fifth. The court erred in assuming jurisdiction in the trial of this action and in all proceedings and in rendering judgment.

ARGUMENT.

19

Upon the admission of North Dakota into the Union, on November 2d, 1889, the "cases, proceedings and matters pending in the supreme and district courts" of the territory of Dakota were provided for by Sec. 23 of the enabling act (25 St. U. S., 683), and the circuit and district courts of the United States thereby established for the new state of North Dakota became the successors of the territorial supreme and district courts in respect to such cases whereof such federal courts might have had jurisdiction under the laws of the United States had such courts existed

20 at the time of the commencement of such cases. All other cases were consigned to the state courts. It was "*Provided, however, That in all civil actions, "causes and proceedings in which the United States "is not a party, transfers shall not be made to the "circuit and district courts of the United States, except "upon written request of one of the parties to such "proceeding filed in the proper court; and in the ab-"sence of such request such cases shall be proceeded "with in the proper state or court.*"

21 Provision was made for such cases as the state courts might receive by the constitution of North Dakota.

(See Schedule, Sec. 6) as follows:

"SECTION 6. Whenever any two of the judges of the supreme court of the State, elected under the provisions of this Constitution, shall have qualified in their offices, the causes then pending in the supreme court of the Territory on appeal or writ of error from the district courts of any county or subdivision within the limits of this state, and the papers, re-
22 cords and proceedings of said court shall pass into the jurisdiction and possesion of the supreme court of the state, except as otherwise provided in the enabling act of Congress, and until so superceded the supreme court of the Territory and the judges thereof shall continue, with like powers and jurisdiction, as if this constitution had not been adopted. Whenever the judge of the district court of any district elected under the provisions of this constitution shall have qualified in his office, the several causes then pending in the district court of the Territory within
23 any county of said district, and the records, papers and proceedings of said district court, and the seal and other property pertaining thereto shall pass into the jurisdiction and possession of the district court of the State for such county, except as provided in the enabling act of Congress, and until the district court of this Territory shall be superceded in the manner aforesaid, and said district courts and the judges thereof shall continue with the same jurisdiction and power to be exercised in the same judicial districts respectively as heretofore constituted under the laws of the Territory."

The plaintiff in error says: 24

First. The right of removal did not exist in this case.

Second. The method of removal was wrong.

The right to remove or transfer this action did not exist because it was not a pending case, proceeding or matter within the spirit and meaning of the statute. If the right to remove did exist then it was not asserted in the proper time nor by the proper method. 25

An important question arises at the outset, viz: is this a question of removal or succession?

If it is a question of passing a pending case from a state court to a federal court then it would seem to come within the general removal laws. If it is a matter of passing a pending case from a territorial court (which had ceased to exist) to a federal court, because the first court could exercise no further jurisdiction and something remained to be done within the exclusive jurisdiction of federal courts, then it 26 would appear to be a matter of succession.

Upon the admission of new states, the jurisdiction of the territorial court at once ceases, and it is necessary to provide by legislation for the unfinished business pending in such courts.

Hunt vs. Polao, 4 How. 589.
Benner vs. Porter, 9 How. 235.
McNulty vs. Batty, 10 How. 72.
Express Co. vs. Kountz, 8 Wall. 342.
Baker vs. Morton, 12 Wall. 150. 27
Rev. Stats. U. S. §§ 567, 569, 703, 704.

Territorial courts are not courts of the United States, within the meaning of the Constitution.

Good vs. Martin, 95 U. S. 90.

But they have jurisdiction co-extensive with that of courts of the United States and of a state combined.

When a new state is admitted there remains of the unfinished business of the territorial courts, cases of which the courts of the United States have exclus-

ive jurisdiction, cases of which the state courts have exclusive jurisdiction, and cases wherein the jurisdiction may be said to be concurrent. The importance of providing by legislation for the disposition of the cases of exclusive federal jurisdiction was early demonstrated in the cases above cited.

There has not been given in any reported decision any reason for consigning the cases of concurrent jurisdiction to the circuit court of the United States to be established in a new state, and it seems that no failure of justice will result, should such cases be left in the state courts. There does not exist any reason for providing for a successor to the territorial courts in respect to cases which might have been brought in the circuit court of the United States, for the district of North Dakota, had such court existed February 24th, 1885, when this action was brought, except as to admiralty cases, cases in which the United States is a party; in effect, those cases which can only be tried in courts having federal jurisdiction.

The defendant contends that because it is a corporation organized by act of congress (which allegation is made in the complaint and admitted in the answer) that this case is one arising under the laws of the United States. (The action is for damages for deceit in the sale of land, and the answer after admitting the corporate capacity of defendant contains a general denial of the allegations of the complaint, a specific denial of damage and nothing more.) If the case at bar was pending on the day after admission and the state court had exercised jurisdiction over it, no one would question its right. The constitution of the new state, as well as the enabling act, had consigned this case to the district court for Stutsman county, state of North Dakota. That was the convenient, orderly and proper thing to do; necessarily there was a brief interruption in federal court business, until federal courts were organized, but the district court of Stutsman county did not cease for one instant of time. It was provided by the state constitution that the territorial judges and court officers should continue to preside over and conduct their respective courts as state courts until the state judges and officers qualified.

The same judge who presided in the territorial court presided over the new state court, the files, records and proceedings were in the court house of Stutsman county and were as much the property of the county under statehood as before. Ninety-five per cent. of the unfinished business was within the exclusive jurisdiction of the state court. Conceding that it was a case which could have been brought in the federal courts, if such courts had existed February 24th, 1885, yet it could as well be brought in the state court and either court could try it. 32

There is no reason why this case must go to the circuit court, and it is submitted that Sec. 23 of the enabling act does not so provide. If this case could be taken from the state court on December 7th, 1889, it was because the right of removal existed under general laws and not because the circuit court was the successor of the territorial court as to this class of cases. 33

Upon the admission of Nebraska in 1867; this distinction was noticed by Mr. Justice Clifford in Baker vs. Morton, 12 Wall. 150, as follows: "Whenever a territory is admitted into the Union as a state, the cases pending in the territorial courts of a federal character or jurisdiction are transferred to the proper federal court, but all such as are not cognizable in the federal courts are transferred to the tribunals of the new state. Pending cases, *where the federal and state courts have concurrent jurisdiction may be transferred either to the state or federal courts by either party possessing that option under the existing laws.*" 34

At that time the only method of transferring a cause which was optional with a party, was found in the general removal laws. 35

Upon the admission of Colorado, in 1876, it was provided by the Act of Congress, of June 26th, 1876, (19 St. U. S. 62) Sec. 8. "That in respect of all cases, proceedings and matters pending in the supreme or district courts of the territory of Colorado, at the time of the admission of said state into the Union, whereof the circuit or district courts by this act established mighe have had jurisdiction under the laws

of the United States, had such courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of the supreme and district courts of said territory, and all the files, records and proceedings relating thereto shall be transferred to said circuit and districts courts respectively, and the same shall be proceeded with therein in due course of law."

This provision was construed in Ames vs. Colorado Central Railroad Company, 4 Dill. 251.

The case came up on a motion by the plaintiff to docket the case in the circuit court of the United States, which motion was denied, because the plaintiff had voluntarily submitted to the jurisdiction of the state court; and afterwards it came before the court again, 4 Dill. 260, plaintiff having presented a petition and bond to the state court and filed a transcript of the record as required under the general removal laws, the defendant moving to remand the cause. In the opinion (p. 262) reference is made to the act of June 26th, 1876, in these words: "This legislation, relating to a particular class of cases and designed to carry out the general purpose of the removal acts, seems to proceed on the theory that the latter are not applicable to cases which originate in a territorial court. *If Congress had consigned all federal cases to the state courts*, plaintiffs would be within the reason, if not the letter, of the removal acts. But this was not done; and that which was done does not in any way tend to prove that the removal acts are by construction to be extended to cases like this—*i. e.*, to cases not within their terms."

It is important to note the difference in this respect between the Colorado act and the one under consideration, the act of February 22d, 1889, providing for the admission of the Dakotas, Montana and Washington. In the latter, Congress did consign the civil cases pending in the territorial courts, in which the United States was not a party, to the state courts.

This act is substantially the Colorado act with an addition and a proviso. The addition provides for all other cases than federal cases and sends them

to the state courts. The proviso, is as follows: 40
"*Provided, however, that in all civil actions, causes,*
"*and proceedings, in which the United States, is not*
"*a party, transfer shall not be made to the circuit*
"*and district courts of the United States, except upon*
"*written request of one of the parties to such action*
"*or proceeding filed in the proper court; and in the*
"*absence of such request such cases shall be proceed-*
"*ed with in the proper state courts.*"

It is clear enough that this refers, not to the cases of exclusive federal jurisdiction, nor to cases of 41
exclusive state jurisdiction, but to cases of concurrent jurisdiction. No such provision was necessary except as to federal business and it could only be effectual as to that kind of federal litigation of which federal and state courts have concurrent jurisdiction.

Hence the case at bar *was consigned to the state court to remain there and be proceeded with until a request for a removal was made.* The immediate successor of the territorial court as to this action was the state court. On November 3d, 1889, the 42
case was in the state court by act of congress and by the terms of the state constitution. The state court by operation of law received it and assumed jurisdiction over it. That court was one of general jurisdiction in a sovereign state and in no sense an inferior court whereof the honorable Circuit Court of the United States for the district of North Dakota was superior.

Between courts of concurrent jurisdiction, the court that first obtains possession of the controversy must be allowed to dispose of it finally. 43

Hagan vs. Lucas, 10 Peters 400.
Freeman vs. Howe, 24 How. 450.

To transfer or remove this cause resort must be had to the general removal laws; and that was what the defendant elected to do. On December 7th, 1889, it filed it's petition and bond in the state court in form and in accordance with the general removal laws, and the state court refusing to allow the transfer, it applied for and obtained a writ of *certiorari*, under Sec. 7, of the Act of March 3d, 1875, which in express terms refers to "causes which shall be remov-

44 able under this act;" and has no application whatever to cases of succession under admission acts.

Dillon on Removal of Causes (fifth ed.) Sec. 90, and note 3.

The defendant having elected to resort to such remedy as it had under the general removal laws, should be held to the limitations found in such laws. But the defendant occupies the anomalous position of asserting its right to a removal under Sec. 23 of the Enabling Act, and resorting to effect a removal to
45 the practice and remedies provided in the general removal laws. If this case was one of exclusive federal jurisdiction, and after admission could only proceed in a federal court, then there would be some reason in the position of defendant. But it is a case which the new state court could dispose of. It had been consigned to the latter court by the proviso which concludes Sec. 23. It was not in the territorial court, that had ceased to exist. It was in a court of general jurisdiction with full control over the parties and the subject matter. Now, why should this case be
46 taken from such state court in a different manner and on different principles than causes are removed from the state courts of Massachusetts? The statute does not require it. There is no controlling necessity or reason for it. Nothing, indeed, but inference and presumptions which contradict the settled law and practice.

In Ames vs. Colorado Central Railroad Company, 4 Dill. 251, arising under the Colorado act, which consigned all federal cases to the federal courts by operation of law and without a "written request,"
47 it was nevertheless held by Circuit Judge Dillon and Mr. Justice Miller that a voluntary submission to the jurisdiction of a state court precluded a party from afterward asserting his right to a transfer.

The case of Bluebird Min. Co. vs. Murray, 45 Fed. 388, construes the Dakota act in the same way.

The jurisdiction which was exercised by the circuit court in this case was exceptional, and such as is not possessed by the other circuit and district courts of the United States. By Sec. 21 of the enabling act (25 St. U. S. 681) it was provided: "The circuit and

district courts for each of said districts, and the 48
judges thereof, respectively, shall possess the same powers and jurisdiction, and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations."

In construing the same words in the Idaho act Judge Sawyer says, in Johnson vs. Bunker Hill, etc. Co., 46 Fed. 417, (bottom of page 418) where the right of transfer was claimed by reason of citizenship: "That indicates a purpose to give the circuit and dis- 49
trict courts of Idaho the same jurisdiction that is possessed by the circuit and district courts of other districts and no more. It does not appear to contemplate an *exceptional* jurisdiction. And to give the construction that is contended for would be to defeat that provision and give the circuit court for the district of Idaho jurisdiction which the United States circuit courts of other districts did not before, and do not now have." "Again, the courts shall *be governed by the same laws and regulations* as those which govern the United States circuit and district courts 50
and judges of other circuits and districts; and to give the construction contended for would be to hold that the circuit court of Idaho would not be governed by the same laws and regulations as the circuit courts of other circuits and districts whose jurisdiction is not affected by a change of citizenship *pendente lite*. "So, again, Sec 19 provides, that from and after the admission of said state into the union, in pursuance of this act, the laws of the United States not locally inapplicable *shall have the same force and effect within said state as elsewhere within the United States*, 51
thus again expressing an intention to put, and keep, the people of Idaho upon precisely the same footing as the people elsewhere in the United States and territories; and not to make them an exception in this matter of jurisdiction as the construction contended for and adopted in South Dakota would do."

The logical conclusion to be deduced from this reasoning is, that cases of concurrent jurisdiction having been consigned by Congress to the state court, for however short a period, can be removed therefrom upon a "written request" in the manner and

52 form that it could be done in the other circuits and districts of the United States, viz: by compliance with the general removal laws.

The history of removal legislation shows that Congress has not intended of late years to increase *unnecessarily* the business of the federal courts.

Dillon on Removals, Sec. 3. (fifth ed.)
Viele vs. Mfg. Co., 40 Fed. 545.

The circuit court of the United States for the district of South Dakota has construed Sec. 23 in two
53 cases where the federal character of the actions depended upon the diverse citizenship, holding that the federal court is the successor of the territorial court, although it seems to be conceded that the state court was the immediate successor until a written request was filed.

Dorne vs. Richmond Silver Mine Co., 43 Fed. 690.
Herman vs. McKinney, 43 Fed. 689.

The circuit court for the district of Washington
54 remanded a cause, Nickerson vs. Crooks, 45 Fed. 658, which depended solely on diverse citizenship as ground for jurisdiction, holding that under the act in question the federal courts do not succeed to such cases pending in territorial courts, since such actions could not have been brought in the federal courts, one of the parties being a resident of a territory. The jurisdiction in all these cases, and the case at bar, depends upon the construction of the words in Sec. 23, of the enabling act, viz: "*might have had jurisdiction under the laws of the United States had such courts existed*
55 *at the time of the commencement of such cases.*" The Washington court construes this language strictly, and holds, that, since the action was brought in the Territory of Washington, it could not have been brought in a federal court, since the parties were not citizens of different states, one being a citizen of a territory.

Circuit judge, Sawyer, holds to the same view in Johnson vs. Bunker Hill Co., 46 Fed. 417, and questions the right of a circuit court to exercise appellate powers in a case taken from a state court and not an admiralty case. Mr. Justice Miller having held to a

contrary view, (under the Colorado act) in Bates vs. 56
Payson, 4 Dill. 265.

It requires something different than a literal or strict construction to hold that the circuit court of the United States for the district of North Dakota "might have had jurisdiction (of the case at bar) under the laws of the United States had such court[s] existed at the time of the commencement of such case[s]. In 1885, when the suit was brought, North Dakota was a part of a territory. Even if the circuit court for North Dakota had existed at that time, it 57
could not have had jurisdiction of this case "under the laws of the United States" as they were at that time. If the circuit court "by this act established" had existed in 1885, no one could then tell what part of Dakota was included within its territorial limits, since Dakota was not then divided. There is no reason why the words used in Sec. 23, should be tortured into the meaning contended for by defendant. It is contrary to the established rule of the federal courts to indulge in presumptions to support jurisdiction. Presumptions are the other way. When 58
it becomes necessary to search between the lines of a statute conferring or defining jurisdiction to support a suppositious jurisdiction it is so well settled that it will be denied, as to require no citation of authorities.

If, however, it be conceded that congress intended that the circuit courts of the United States should be the successors of the territorial courts, in respect to all such cases which could be brought in the former, provided they were commenced after statehood, and after the organization of the federal courts, to the 59
extent of providing a right of removal, still this action is not within the letter or spirit of such interpretation, for these additional reasons:

First:—The time for removal had expired.

Second:—The case had gone to final judgment and was not "pending."

Third:—If this is a matter of succession purely and not of removal, under the general removal laws, then the circuit court had not the power or right to enforce removal of this cause by *certiorari*.

60 *First:*—The time to apply for a removal had expired. The time is not limited by the enabling act and it is reasonable to look to the general law on that subject for a rule, since there is a limitation somewhere. The time to answer had long since expired, the case had been tried and judgment rendered. If it be said that such construction would defeat the defendant of its right to a removal, it may be answered that it possessed no such right. Even though such a consequence might follow, the question would be one of interpretation, and not of power to restrict
61 or abrogate such right.

Simonson vs. Jordan, 30 Fed. 721.
Manly vs. Olney, 32 Fed. 708.
Morey vs. Lockhart, 123 U. S. 56.
Wilkinson vs. Nebraska, 123 U. S. 286.
Sherman vs. Grinnell, 123 U. S. 679.

Even if the time should be permitted to run from the period where defendant did have an opportunity to exercise the privilege, viz: November 2d, 1889, when North Dakota was admitted; still it was not
62 attempted until December 7th, 1889, when more than the time allowed to plead had expired. The Code of Civil Procedure of North Dakota, Sec. 112, provides, "the only pleading on the part of defendant is either a demurrer or an answer. It must be served within thirty days after the service of the copy of the complaint."

Second:—The case had gone to final judgment, after trial by jury, more than a year before the request for a removal was made and the suit was not
63 pending.

The case of United States vs. Taylor, 44 Fed. 2, may be cited as supporting the removal here; but that was a case wherein the jurisdiction of the federal courts was exclusive; the removal was allowed to enforce the judgment, not to set it aside and order a new trial.

Either that case must go to the federal court or cease to be; no other court could exercise jurisdiction over it. It illustrates the reason and necessity for providing in the enabling act for a successor for each

class of business pending in the territorial courts, 64
wherein the succeeding court exercises a jurisdiction
exclusive of other courts.

The spirit and purpose of all removal legislation is to secure a fair trial in a fair court, and, as was said in Stevenson vs. Williams, 19 Wall. 572, "After a final judgment had been rendered in the state court, the case can not be removed to the circuit court of the United States, and "there proceed" as the statute provides "in the same manner as if brought there by original process," without setting aside the trial and 65
judgment of the state court as of no validity. No such proceeding is contemplated by the act and since the decision of Justices vs. Murray, 9 Wall. 274, legislation directed to that end would be of doubtful validity."

In Vannevar vs Bryant, 21 Wall. 41, after jury trial and verdict, but before judgment and pending a motion for a new trial, a petition was presented to re-remove the case under the act of 1867. In delivering the 66
opinion, Chief Justice Waite says: "The act authorizes the petition for removal to be filed at any time before the final hearing or trial of the suit." * * *
"After one trial, the right to a second must be perfected before a demand for the transfer can properly be made. Every trial of a cause is final, until in some form, it has been vacated. Causes can not be removed to the circuit court for a review of the action of the state court, but only for trial. The circuit court can not, after one trial in a state court, determine whether there shall be another. That is for the state 67
court. To authorize the removal, the action must, at the time of the application, be actually pending for trial; such was not the case here."

If this case is within the spirit and meaning of the removal laws, the application, made after judgment, came too late.

Justices vs. Murray, 9 Wall. 274.
Fashnacht vs. Frank, 23 Wall. 416.
Bank vs. Claypool, 120 U. S. 193.
Dillon on Removal, Sec. 114.
Bryant vs. Rich, 106 Mass. 193.

68 Counsel for defendant claim that there is presented here no question of removal, but one of succession alone. The federal court, it is said, is the successor of the territorial court, and may hear and determine a motion for a new trial. Like the king who never dies, the court goes on forever. This theory is sound when applied to exclusive federal matters, but aside from that it does not reflect the spirit of the statute and it contradicts the history of legislation on this subject. At the date of the enactment of the act in question the thought of stemming the tide of liti-
69 gation flowing into the federal courts was uppermost in the minds of legislators.

The defendant's theory has resulted in placing on the calendar of this court three cases from one county of North Dakota alone, viz; the case at bar and numbers 784 and 785, all of which were commenced in the district court for the late territory and removed after admission.

In any view the case was not pending; there was no valid bill of exceptions, the motion for a new trial
70 had lapsed and could not be considered by any court. This question depends upon the practice of Dakota territory which was taken from California.

The motion for a new trial was based upon an alleged bill of exceptions. The bill of exceptions was not settled within the time limited by the statute of Dakota territory. Comp. laws, Sec. 5083, viz:

"When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, with-
71 in thirty days after the entry of judgment, if the action were tried with a jury, or after receiving notice of the entry of judgment if the action was tried without a jury, or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare a draft of a bill and serve the same, or a copy thereof upon the adverse party. Such draft must contain all the exceptions taken, upon which the party relies. Within twenty days after such service the adverse party may propose amendments thereto, and serve the same, or a copy thereof, upon the other party. The proposed bill and amendments must, within ten days thereafter, be presented by the party

seeking the settlement of the bill to the judge who tried or heard the case, upon five days' notice to the adverse party, or be delivered to the clerk of the court for the judge. When received by the clerk, he must immediately deliver them to the judge, if he be in the county; if he be absent from the county, and either party desires the papers to be forwarded to the judge, the clerk must, upon notice in writing of such party, immediately forward them by mail or other safe channel; if not forwarded, the clerk must deliver them to the judge immediately after his return to the county. When received from the clerk, the judge must designate the time at which he will settle the bill and the clerk must immediately notify the parties of such designation. At the time designated the judge must settle the bill. If no amendments are served, or if served are allowed, the proposed bill may be presented with the amendments, if any, to the judge for settlement, without notice to the adverse party. It is the duty of the judge in settling the bill, to strike out of it all redundant and useless matter so that the exceptions may be presented as briefly as possible. When settled the bill must be signed by the judge, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk."

72 73 74

The settlement of a bill of exceptions is a judicial act and there is no jurisdiction for such act after the time limited by law or extended by the court has expired.

Muller vs. Ehlers, 91 U. S. 249.
Sweet vs. Perkins, 24 Fed. 777.
Marine Co. vs. Heneshof, 32 Fed. 822.
Libby vs. Crossly, 40 Fed. 564.
Hayne on New Trial, p. 773.
Higgins vs. Mahoney, 50 Cal. 444.
Cooney vs. Furlong, 6 Pac. 388 (Cal.)
Bunnell vs. Stockton, 23 Pac. 302 (Cal.)
Buckley vs. Althoff, 24 Pac. 635 (Cal.)
Gimbel vs. Turner, 14 Pac. 255 (Kan.)
Hake vs. Struble, 12 N. E. 676 (Ill.)
Short vs. Railroad Co., 44 N. W. 539.
Howard vs. Bowman, 23 Pa. 68 (Wy.)
Shewalter vs. Bergman, 23 N. E. 686 (Ind.)
Finley vs. Whitley, 22 N. E. 640 (Ohio).

75

76 Sisson vs. State, 45 N. W. 1129 (Wis.)
Evans vs. St. P. F. and M. Co., 11 N. W. 594 (Wis.)
Powell vs. Sturdevant, 4 So. 718.
City of Westminster vs. Shipley, 13 A. 375.
Greenwood vs. Craig, 43 N. W. 427 (Neb.)

The paper which purports to be a bill of exceptions was settled and signed after the time limited by statute and after the six several extensions made by the court, and at a time when the court had no juris-
77 diction to settle or sign a bill of exceptions.

Otherwise the statute limiting such time is of no effect, and the orders of the court extending such time were unnecessary, and there is no limit of time for an exercise of such jurisdiction.

The motion for a new trial is made on the bill of exceptions and if the bill of exceptions is disregarded so must the motion be disregarded.

Bunnell vs. Stockton, 23 Pac. 302 (Cal.)

Under the territorial statutes, the time for mak-
78 ing a motion for a new trial was limited. Comp. Laws, Sec. 5090.

"The party intending to move for a new trial must, within twenty days after the verdict of the jury, if the action were tried by jury, or after notice of the decision of the court, if the action were tried without a jury, serve upon the adverse party a notice of his intention, designating the statutory grounds upon which the motion will be made and whether the same will be made upon affidavits, or the minutes of the court, or a bill of exceptions, or a statement
79 of the case," etc.

Sec. 5092.—"The application for a new trial shall be heard at the earliest practicable period after service of notice of intention, if the motion is to be heard upon the minutes of the court, and in other cases, after the affidavits are served or the bill of exceptions or statement, as the case may be, is filed, and may be brought to a hearing in open court or before the judge at chambers, in any county in the district in which the action was tried, by either party, upon notice of eight days to the adverse party, specifying the time and place of hearing," etc.

Judgment was rendered November 28th, 1888; 80
notice of intention to move for a new trial and motion for a new trial was served September 3d, 1889. Hearing was set for September 13th, but the matter was continued to September 21st, 1889. Nothing further was done in the territorial court and the motion was never submitted to that court. It was not filed until a week after the petition for removal was filed, and it was then filed in the state court.

When the time for making a motion for a new trial has expired and not been extended the court has 81
no jurisdiction to hear or determine such motion.

Nichols vs. Bruns, 5 Dak. 28–30.
Cambuston vs. United States, 95 U. S. 295.
White vs. Superior Court, 14 Pac. 87 (Cal.)
Altman vs. Leahy, 38 N. W. 740 (Neb.)

The case of Johnson vs. Northern Pacific Railroad Company, 48 N. W. 227, may be cited to support the bill of exceptions in tis case. The supreme court of North Dakota, in that decision, passed upon the power of a judge to settle a bill of exceptions, after 82
the time limited by law, against the objection of the successful party, and without making an order extending the time for such act; the court holding, that the "actual settlement operates *ipso facto* to extend the time to the date of settlement;" and further, "We think it was the purpose of the act of 1887 to place the whole matter of settling bills and statements for a new trial, and giving notice of intention, within the sound judicial discretion of the trial court as to the time within which the several steps in the process may be taken, after the statutory limit has been 83
passed."

This decision goes on the theory that the jurisdiction rests in the discretion which the court may choose to exercise. If the court thinks best the court has authority or jurisdiction. Even if that decision is conceded to be the law of the matter it embraces, it may be distinguished from the one under consideration. The certificate which is annexed to the bill of exceptions in this case shows that the judge did not intend to extend the time for the settlement and allowance of such bill. The certificate as first signed

84 contained these words, "*and within the time provided by law, as enlarged and extended by orders of the judge of this court.*" An amendment to the certificate added afterwards directs these words stricken out to make the certificate "*conform to the facts and record in the case.*" (record p. 9.)

In the light of this certificate it is difficult to conclude that the court intended, in the exercise of discretion, to extend or enlarge the time.

85 The sense and meaning of the whole certificate is, that it was first signed and allowed inadvertently, but the act would be permitted to stand for what it was worth.

In Moe vs. Northern Pacific R. R. Co., 59 N. W. Rep. 715, the North Dakota Supreme Court, in a later decision, holds that the authority of a judge to extend time and settle bills of exception after the statutory period for so doing has expired, is not an absolute, non-reviewable discretion, but on the contrary, such discretion is a sound judicial discretion and can be 86 exercised only upon the conditions named in the statute—*i. e.* "*upon good cause shown in furtherance of justice.*"

In this case there was not any cause shown, good, bad or indifferent. The record shows upon its face that the extensions were not in furtherance of justice, but merely for *delay*. These orders appear in the record pp. 22 to 25. The second and third purport to be made upon good cause shown, but the last three do not. They were obtained *exparte*, without notice or cause whatever. Commencing with 87 the fourth in order, (record p. 24) it shows that the bill of exceptions had been prepared and served upon the plaintiff. No amendments to that bill were proposed (see certificate of the judge to that effect, record p. 8, bottom). Nothing remained to be done but to have it signed and settled without objection. It was afterwards settled exactly as proposed. Without any reason or cause whatever, a fifth order was secured extending the time for the settlement of the bill. Still later another order was made granting a further extension, and equally without reason which could be denominated good cause. There was a reason, of

course, and if the truth were known, it would appear 88
that all these delays and extensions were part of a system of dilatory tactics had a plan to get the case away from a court which and been tried and found to be opposed.

Atfer the sixth and last order the defendant apparently concluded that orders were not necessary, and although the last order extended the time for the settlement of the bill to June 29th, 1889, it was not offered for settlement or any attempt made to 89
settle it until August 30th, 1889. Defendant had become impressed with the fact that the time had been and was extended, and so caused the certificate of settlement to recite that it was done within the time as extended by the judge. That statement was incorrect and the judge afterwards corrected it. He had been induced to sign the bill and also, in effect, to extend the time again. He repudiated the extension. And the record now shows affirmatively that the settlement of the bill was made after the time limited by law and without any order extending the time, or 90
any act equivalent thereto. It shows no good cause, and it is apparent that the act was not in furtherance of justice. The same and worse methods are shown by the record, to float a motion for a new trial. *It was never presented to the state court for a ruling and was not even filed in court or made a part of the record until after the petition and bond for removal had been made and filed.*

However, the time may have been extended for the settlement of the bill of exceptions, no act can be 91
pointed to which extended the time for making a motion for a new trial beyond the sixth and last order of the court made May 23d, 1889. This order extended the time for a motion for a new trial until ten days after June 29th, 1889. The time thus allowed had long since expired, when a motion was served upon the plaintiff's counsel, September 3d, 1889; and when the hearing was continued to September 21st, 1889, and on that day the motion was not presented, was not heard, not decided, and the hearing not further adjourned; it ceased to be a pending motion, if it ever had any existence.

92 *Third:* If this case is one of succession, and not of removal under the general removal laws, then it was error in the circuit court to wrest jurisdiction from the state court by *certiorari.*

The only authority for such proceeding is found in Sec. 7 of the act of March 3d, 1875, and is confined to cases arising under that act.

Dill. on Removals, Sec. 90 and note 3 (fifth ed.)

If this is a question of succession under the en-
93 abling act then the circuit court had no power to issue or enforce such writ.

Burke vs. Bunker Hill etc. Co., 46 Fed. 644-649.
Back vs. Sierra Nevada C. M. Co., 46 Fed. 673.

In Burke vs. Bunker Hill, etc. 46 Fed. 649, Circuit Judge Sawyer says. "But the state court, having possession of the records, files, papers, etc. in this case, refuses to transmit them in pursuance of the request made, and as required by law; and we are asked to make an order requiring the state court, and
94 its clerk to transmit them as the law requires, and as they should do. But the statute gives us no such authority. We are not referred to any law which would justify us making any such order, or authorizing us to enforce an order if made. We have certainly no controling, or supervising power over the state courts, or their clerks, and not even any appellate jurisdiction over them. The state and circuit and district courts of the United States, are courts of coordinate jurisdiction, only, upon some matters; but having no relation to or with each other. They are
95 courts of different sovereignties, each acting upon their own views of their powers and duties, and neither subject to interference from the other. We know of no means by which we can compel the state courts to send the records which belong under the law to this court; and such an order would be merely *brutum fulmen;* and a *certiorari,* only goes from a superior to an inferior court."

At common law the writ of *certiorari* issues from a superior to an inferior court. The circuit court of the United States for North Dakota is not the superior of the state courts of that state, and in the ab-

sence of express statutory authority has no power to 96
enforce removal of causes by *certiorari*.

Foster's Federal Practice, Sec. 365.
Ex Parte Van Orden, 3 Blatchford 166.
Benchley vs. Gilbert, 8 Blatchford 147.
Scott vs. Clinton & Springfield R. R., 6 Bissell 529-537.
Patterson vs. United States, 2 Wheat. 221.

Prior to 1875 mandamus was sometimes resorted to for the purpose of enforcing removal.

Justices vs. Murray, 9 Wall. 274. 97

In a note to the case last cited, the court prevents the decision from being cited as an authority for the power, but expresses no opinion on the subject.

"Congress could confer such a power, but has not done so."

Dillon on Removal (fifth ed.) Sec. 91.

The circuit courts of the United States have no power to issue writs of mandamus except as they are expressly and specially authorized by statute.

McClung vs. Siliman, 6 Wheat. 598. 98
McIntire vs. Wood, 7 Cranch 504.
Kendall vs. United States, 12 Pet. 524.

If the case was removable no *certiorari* or mandamus was necessary, since the defendant had a remedy by appeal to the state supreme court and then to the supreme court of the United States.

Dillon on Removal (fifth ed.) Sec. 160.
Removal Cases, 100 U. S. 457.
Railroad Co. vs. White; 111 U. S. 134.

It is true that the plaintiff appeared in the circuit 99
court and tried the case to a jury in that court; but he had objected to the jurisdiction at every stage; had moved to remand the cause, and after the judgment had been set aside and a new trial ordered, he had no alternative but to proceed to a final judgment and then sue out a writ of error to test the question of jurisdiction. The defendant would not move and the plaintiff was forced to proceed or abandon the field.

Edrington vs. Jefferson, 111 U. S. 770.
Graves vs. Corbin, 132 U. S. 571.
McLish vs. Roff, 12 Sup. Ct. Rep. 118.

100 The plaintiff did not and could not waive the jurisdictional question involved.

Parker vs. Ormsby, 141 U. S. 81.

The illegal method by which the circuit court acquired jurisdiction was not assented to by the plaintiff, in again submitting his cause to a new trial, since it was done after all methods to correct the error had failed. After protesting against the jurisdiction of the court and arriving at a point where he must either try his case again or suffer judg-
101 ment to go againt him, he waived no point which had been saved on the record.

Harkness vs. Hyde, 98 U. S. 476.
B. & O. R. R. vs. Koontz, 104 U. S. 5.
Railroad Co. vs. Swan, 111 U. S. 379.

It is equally true that where a state court asserts jurisdiction after a proper application for removal, the question of jurisdiction is not waived by the party entitled to the removal, by reason of his appearing and contesting in the state court the matter in
102 dispute.

Insurance Co. vs. Dunn, 19 Wall. 214.
Removal Cases, 100 U. S. 475.

The case of Patterson vs. United States, 2 Wheat. 221, was a case relating to revenue, brought in a district court of the United States and removed before trial, by *certiorari*, to a circuit court. No objection was made to the jurisdiction of the circuit court, no motion to remand was made. The defendant who might have successfully objected to such proceeding voluntarily appeared in the circuit
103 court, and this court held, that since the circuit court had jurisdiction of the subject matter, it had acquired jurisdiction over the defendant by his voluntary appearance; but in speaking of the writ of *certiorari*, the court said: "The district court, therefore, *might and ought to have refused obedience to the writ of certiorari* issued in this case by the circuit court, and either party *might have moved the circuit court for a procedendo* after the transcript of the record was removed into the circuit court, or might have pursued the cause in the district court, in like manner as if the record had not been removed."

Here the state court at first refused to allow the 104
removal of the cause and of the files, records and proceedings; it did not go to the length of refusing obedience to the writ of *certiorari*. The writ of *certiorari* was directed to the clerk and he yielded. Proceedings for contempt of circuit court confronted him and without more ado he sent the original papers into the circuit court. That was the proper and orderly thing to do, since as between state and federal court it belongs to the latter to determine questions of conflicting jurisdiction; the ultimate arbiter being the 105
Supreme Judicial Tribunal of the nation.

Freeman vs. Howe, 24 How. 450.

A conflict was thus avoided and the plaintiff in error had no choice but to follow his judgment. His first appearance in the circuit court was his motion to discharge the alternative writ of *certiorari* based on the ground that the circuit court had no power to make or enforce it. A motion to remand the cause was next made, and after the circuit court had vacated the judgment which plaintiff had secured in the 106
state court and ordered a new trial nothing was left but to proceed with the case to a final judgment in order that the action of the court might be reviewed on writ of error. It will be claimed by counsel for defendant in error that this case is one which ought to have been transferred, that the circuit court was the successor of the state court, upon written request being filed, and that it could be tried on a transcript of record. The fact is, however, that no transcript was filed or offered to be filed, and the record shows that no transcript was ever requested from the clerk 107
of the state court (record p. 10). The source of jurisdiction and basis of all proceedings in the the circuit court was, and is, the original files, records and proceedings, transferred in obedience to the writ of *certiorari*, a compulsory process which admitted of nothing but prompt obedience. Thus is presented a cause where the jurisdiction depends wholly upon the unlawful use of an arbitrary power. If the issuance of the writ of *certiorari* was illegal then the jurisdiction is no better than if it were acquired by force or by fraud. It will be claimed that the circuit court rightfully acquired jurisdiction by the filing of the

written request, *eo instanti*, and that it matters little how the record was secured, so that it was secured. But it will not do to thus invite the state courts to resist such writs in matters of doubt. The federal courts have uniformly asserted the right to settle questions of jurisdiction primarily and have and do now expect the state court to defer to their decisions in such matters. If this court should be of opinion that an unwarrantable use of the writ of *certiorari* has been made here, then it is confidently expected that the comity existing between the federal and state courts will prompt an order requiring the return to the state court of the files, records and proceedings now in the circuit court.

Courts universally abhor the use of force or fraud in acquiring jurisdiction. An orderly and dignified method is required in all cases in bringing the person of the defendant or the subject matter into court. The method used here does not present that orderly course which the process of courts usually take and it should not be supported but discountenanced. If the writ of *certiorari* was a process which the circuit court could not rightfully issue, then jurisdiction was as much acquired by force as where a defendant is arrested, carried within the territorial jurisdiction of a court by force and then served with process. Such service will be repudiated and set aside by the court and it will not be permitted to confer any jurisdiction

Blair vs. Turtle, 5 Fed. 394.

In a similar case, Ilsley vs. Nichols, 12 Pick 270, Shaw, C. J., said: "These cases, therefore, seem to establish the general principle that a valid and lawful act can not be accomplished by any unlawful means, and whenever such unlawful means are resorted to, the law will interpose and afford some suitable remedy, according to the nature of the case, to restore the party injured by these unlawful means to his rights.

And see, Dunlap vs. Cody, 31 Iowa 260.
Brown on jurisdiction, Sec. 43.

In conclusion the plaintiff in error says, that Sec. 23, of the Enabling Act, did not contemplate that

the circuit courts should be the successor of the territorial courts save in cases of exclusive federal jurisdiction. That there was no reason for providing for a system of removal of such cases as the one at bar, which opens the door wider than it now is under the general removal laws. The act in question did not intend to confer upon the circuit courts thereby established, a jurisdiction other and different than that possessed by the other circuit courts of the United States. 112

If, however, it should be held that such was the intention, and that the general removal laws do not apply to or govern this case, then it was a serious error to wrest the files, records and proceedings from the state court by *certiorari*. 113

Counsel for plaintiff in error respectfully submit that all proceedings in the circuit court have been without jurisdiction; that the same should be vacated and held for naught; and this cause ordered to be remanded to the state court from whence it came with costs against defendant in error.

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Office Supreme Court U. S.
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CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

ALBERT H. GLASPELL, Plaintiff in Error,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY.

No. 1330.

In Error to the Circuit Court of the United States for the District of North Dakota.

BRIEF FOR DEFENDANT IN ERROR.

A. H. GARLAND,
H. J. MAY,
For Defendant in Error.

PRESS OF McGILL & WALLACE, WASHINGTON, D. C.

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BRIEF FOR DEFENDANT IN ERROR.

As shown by the amended complaint, this action was commenced in the District Court, in the county of Stutsman, in the Territory of Dakota, the original complaint having been filed in February, 1885, and the amended complaint in October, 1886 (Rec., 5, 15–19). The plaintiff in error asked judgment for damages in the sum of $14,000 (Rec., 19). Issues were joined by the answer (Rec., 20). Upon the trial of the case a verdict was found in favor of plaintiff in error for $12,609.58, and judgment entered thereon (Rec., 21–2). The term within which to settle a bill of exceptions, to serve notice of intention to move for a new trial, and within which to

move for a new trial, was extended several times by order of the court (Rec., 22–25). Notice was served on counsel of the intention to move the court to vacate and set aside the verdict and judgment, and for a new trial, and that the motion would be brought up in chambers on September 12, 1889, but the court, on its own motion, continued the hearing until the 21st of the same month (Rec., 25–39). The continuance is signed by Judge Rose as an endorsement on the motion, which clearly makes the paper a part of the proceedings in the case, although it was not otherwise filed until December 14, 1889 (Rec., 26). Counsel for Glaspell had been served with a copy, and it was not necessary to file the motion until it was brought up for hearing. This motion was pending in the territorial court when the act of February 22, 1889 (25 Stat. L., 682–3), became a law, and under which North Dakota was admitted into the Union as a State. No proceedings were had in the case in the State court that succeeded the territorial court, and none are shown by the record. The judge forbade the clerk to certify the case to the United States Circuit Court, according to the clerk's return to the rule to show cause, but no order of the judge to this effect appears in the record (Rec., 5).

The United States Circuit Court having succeeded the territorial court, and jurisdiction having been conferred on the former court by reason of such succession, an application and a request in writing were made to the District Court of Stutsman County, by the defendant in error (Rec., 2, 3), for the removal of the case to the United States Circuit Court for the district of North Dakota for further proceedings under section 23 of the act of Congress approved February 22, 1889, *supra*. A proper bond for the removal of the case was tendered (Rec., 3, 4), and the clerk of the District Court of Stutsman County admitted the tender of his fees, but, as heretofore stated, refused to transmit the record to the Circuit Court of the United

States in accordance with the request, because the judge of the District Court of Stutsman County ordered him not to do so (Rec., 5). Upon this condition of affairs the defendant in error applied to the circuit court of the United States for the district of North Dakota for an alternative writ of certiorari (Rec., 1, 2); the writ was allowed (Rec., 5–7). The clerk made a return (Rec., 7–10), upon which counsel for plaintiff in error moved for the discharge of the order to show cause on the ground that the United States Circuit Court had no jurisdiction (Rec., 10, 11). The motion to discharge was overruled, and upon the petition for certiorari and the answer thereto it was adjudged that such answer was insufficient and that it be quashed; and further, that the case is one to which the Circuit Court is the successor of the territorial court within the meaning of the act of February 22, 1889 (25 Stat. L., 682–3, chap. 180), and that the writ of certiorari issue, etc. (Rec., 11, 12). The writ was issued accordingly (Rec., 12–14) and the clerk thereupon certified the records in the case to the Circuit Court (Rec., 14, 15).

Thus the case was brought to the Circuit Court by the writ of certiorari on July 29, 1890, with the motion for a new trial pending. On August 22, 1890, counsel for Glaspell appeared and filed a motion to remand the case to the District Court of the State (Rec., 39, 40). The motion was denied, and an exception allowed (Rec., 40, 41). The United States Circuit Court having fully assumed jurisdiction, notice was given by counsel for the defendant in error that the motion for a new trial, made in the court below, would be brought on for hearing at chambers at Fargo on September 5, 1890. Service of the notice was admitted by counsel for plaintiff in error (Rec., 41). It seems that counsel for Glaspell moved for judgment, but the motion is not in the record. The court, however, denied the motion for judgment, but set aside the verdict and judgment, and granted the Northern

Pacific Railroad Company a new trial upon all the issues (Rec., 42–56). An opinion was delivered by the court on the motion for a new trial (Rec., 42–55). By agreement of counsel the case was tried in the Circuit Court of the United States at Fargo in May, 1891, and a verdict rendered in favor of the plaintiff in error for $1,120, upon which judgment was entered with costs (Rec., 57, 58). The writ of error and citation follow (Rec., 58–60). There are five assignments of error in the record, but it is not necessary to discuss them separately, inasmuch as they are all included in the discussion of the leading propositions in the case.

First. Did the Circuit Court of the United States err in holding that it was the successor of the territorial court in this case and in taking jurisdiction thereof?

The language of section 23 of the act approved February 22, 1887, *supra*, is as follows:

"That in respect to all cases, proceedings, and matters now pending in the Supreme or District Courts of either of the Territories mentioned in this act at the time of the admission into the Union of either of the States mentioned in this act and arising within the limits of any such State whereof the Circuit or District Courts by this act established might have had jurisdiction under the laws of the United States, had such courts existed at the time of the commencement of such cases, the said Circuit and District Courts respectively shall be the successors of said Supreme and District Courts of said Territory."

* * * * * *

We contend that at the time of the admission of North Dakota, there was pending in the territorial court such a *case, proceeding,* or *matter* as the Congress contemplated in the language used in section 23 of the act. The motion for a new trial was a proceeding or matter pending which had the effect of suspending further proceedings in the case until it should be determined. The case was pending under section 5343 of the Compiled Law of Dakota

Territory. It was commenced in the territorial court in 1885, and has not been finally determined on appeal, nor has it otherwise been finally disposed of. The effect of the motion for a new trial was to suspend further proceedings in the case until such motion was allowed or denied. Here, during the pendency of the motion, the territorial court was abolished, and jurisdiction over further proceedings in the case transferred, at the request of either party in writing, on the United States Circuit Court. Such request was made in accordance with the proviso to section 23. The time for an appeal had not expired at the date of the admission of North Dakota. But the proceedings were suspended and the case was not in an appealable condition. The Federal court, therefore, succeeded to the jurisdiction in this case *pendente lite*. The territorial District Court had power and control over its judgment during the term at which it was entered, and here it suspended its judgment, on a motion for a new trial, until the statute abolished the court. The Circuit Court succeeded to this power and control, and in the exercise thereof set aside the verdict and vacated the judgment. It took up the case where the District Court left it, in its unfinished condition. And after all it was only a change of procedure caused by the will of Congress, over which the parties to the action had no control. The United States Circuit Court and the territorial District Court became one and the same, under the legislation of Congress, for the purposes of this case. Any change made by law in the procedure or in the remedy in the case did not affect the existing rights of either of the parties in the pending litigation. No construction of a law is to be tolerated that deprives a person of any legal right he possesses before and at the time of the passage of such a law. The right to proceed further here existed when the law lifted this Territory up into the sisterhood of States; and the law gave the right to

stop the case there and carry it entire to the Federal court. Is it possible it could be carried there with a loss of a single right already existing? Did it not go into the Federal court, precisely and just as it was pending in the territorial court, with all the rights of all the parties intact? If not, then truly this is an instance where the law is a snare and a delusion of the first class.

End. Int. Stats., §§ 282, 285, 286, 287.

Larkin *v.* Saffarans, 15 Fed. Rep., 148, 150, and cases cited.

People *v.* Tibbitts, 4 Cow., 384.

Hunt *v.* Palao *et al.*, 4 How., 589, commented on and explained in Benner *v.* Porter, 9 How., 235, 245, *et seq.*

People *v.* Livingstone, 6 Wend., 526.

Second. Would the United States Circuit Court have had jurisdiction, under the laws of the United States, had such court existed at the time of the commencement of this action?

It will be seen by reference to section 23 that the Circuit and District Courts of the United States, established by the act, can take jurisdiction, by transfer, only of such cases as would have come within their jurisdiction had such courts existed at the time of the commencement of such cases, and in all such cases the United States courts are the successors of the district courts of Territory. The defendant in error is a Federal corporation, and it seems indisputable that the newly-established Circuit Court would have had jurisdiction of the case, at its commencement, if such court had been in existence.

Pacific Railroad Removal Cases, 115 U. S., 1.

The transfer of the case to the Circuit Court was a right guaranteed to the defendant in error under the pro-

visions of section 23, *supra*, and the only condition imposed upon it to secure such right was the filing of a written request therefor in the proper court, which was done. The language of that section is broad and sweeping, and it makes no exceptions whatever in the given cases, and we all know when statutes make no exceptions the courts can make none.

Third. The jurisdiction of the Circuit Court having been established, the next inquiry is, did the court invoke the proper remedy to bring the case before it. The clerk of the State Court, under the direction of the judge, refused to transmit the files, proceedings, etc., in accordance with the application of the defendant in error (Rec., 5). The writ of certiorari was the only remedy left, and it was the proper one. The court was authorized to issue it (R. S., § 716; 1 Tidd Pr. (Am. Ed.), 397–8, note A; U. S. *v.* Young, 94 U. S., 258; Harris *v.* Barber, 129 U. S., 366–9; Bump on Fed. Proc., p. 404, and cases cited). And this was especially so here, where no provision was made for appeal, writ of error, or other proceedings under the act of Congress. The facts in this case bring it exactly under the provisions of section 7 of the act of March 3, 1875, which authorize the issuance of the writ of certiorari under these conditions (1 Supp. Rev. Stat. (2d ed.), p. 84; 18 Stat. L., 470; Dill. Rem., § 90; Speer Rem., § 50, p. 89; Fost. Fed. Prac., § 390 and note).

The case being a proper one to be brought from the State court to the United States Court, the judge of the latter could adopt any process known to the law to bring the case there.

It can not be worth while to extend this brief further upon the points presented.

But some notice is due to a peculiarity in this case which, possibly, has escaped the attention of the court.

This writ of error is prosecuted under the act of Feb-

ruary 25, 1891 (25 Stat. L., 693), which allows a party *against whom a judgment or decree is rendered* to bring the case to this court regardless of the amount of the judgment or decree, where a question involving the jurisdiction of the trial court is presented. Now it so happens in this case, the plaintiff in error has no judgment or decree rendered against him, but he is the successful party, receiving a judgment of over eleven hundred dollars, true, not as much as his extravagant claim was, by great odds, but still it is a judgment in his favor. Then is the benefit under this act one coming to him? Does his case come within the meaning of that act, which was intended evidently for different purposes than are to be seen here under this writ of error? It is submitted, most respectfully, it does not. And then if it does come here properly under that act, surely the 32d rule does not cover it, but it must stand as any other writ of error and wait patiently its time on the docket.

But it must be seen, that construing this act of February 25, 1891, with the general law, the case should be dismissed, as the jurisdictional amount for this court is not disclosed, and leave the party to seek his remedy by other methods not worth while here to discuss.

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H. J. MAY,
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